[312] Q. What is exactly your standards? I listened and that's what I thought you said, ma'am, really. I thought that you said that the man is entitled to his day in court if there's any way that you can find—

A. If this particular incident—

Q. Now, ma'am, would you listen to my question—

A. —had happened in my local union where that there was doubt that the company was right in justifiably discharging Mr. Bowen that we would have recommended arbitration. That was my sole purpose in my opinion—

Q. Okay, ma'am, I misunderstood, ma'am, I think maybe the Judge misunderstood. I thought you were here for a larger purpose. If you don't know, [313] ma'am—

THE COURT: How do you think the Court misunderstood?

MR. JACOBSOHN: Okay, I misunderstood what the Court was using the witness for, Your Honor, or permitting the use.

Q. In terms of what other unions do, and the burdens they place on themselves before they go to arbitration: you have no knowledge as to that?

A. I have had discussions with other union officers and officials, but I am not a expert on other union's procedures.

• • • •

[316] THE COURT: All right.

DONALD D. JOHNSON,

an adverse witness, called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POFF:

Q. Mr. Johnson, I believe you are Donald D. Johnson.

A. Yes, sir, that's correct.

Q. And you are employed by the American Postal Workers Union?

A. Yes, sir.

Q. You are an Administrative Vice President of that Union in charge of clerks' affairs?

A. Yes, sir.

Q. I guess it is safe for me to say that you are not related to the previous witness, Mrs. Gladys Johnson.

A. Not in any way.

Q. And I believe, sir, that you were one member of a three member arbitration panel that had been created by the Postal Workers Union to consider grievances by clerks?

A. True.

Q. Now, Mr. Johnson, incidentally can you [317] enlighten us, sir, as to the number of members in the American Postal Workers Union. I have the impression that there are perhaps two-hundred and fifty or three hundred thousand members in that Union?

A. I believe there is approximately two-hundred and fifty thousand members on direct dues check-off list. And we have approximately twenty to thirty thousand associate members.

Q. And I believe the regular dues as of the moment for those who are on a regular check-off list is somewhere in the vicinity of ten dollars ($10.00) per month?

A. No, that depends on each individual Local. They have their own right to set their own dues. The National dues per capita tax is a little over three dollars ($3.00).

Q. Now, Mr. Johnson, I believe the American Postal Workers Union has a National Convention every year, does it not?

A. No.

Q. Well, did it, in 1976, have an annual convention?

A. Yes, bi-annum.

Q. I believe this was a two-week convention approximately?

[318] A. It's a one week convention; the executive board goes in a week ahead of time.

Q. And I believe on this particular—in this particular year, the meeting was approximately August 1 to August 15, 1976?

A. Yes.

Q. And that meeting was held in Las Vegas?

A. True.

Q. How many people approximately were in attendance at that meeting, sir?

A. Twenty-five hundred is a rough guess.

Q. Mr. Johnson, I note from the constitution and by-laws various salaries being fixed, and I notice that as the Administrative Vice President the salary—your salary appears to be $43,150.00 plus expenses, is that up to date?

A. Yes, sir. That is.

Q. So I take it when you talk about expenses that for such matters as Union business in attending the National Convention in Las Vegas, that that would be paid as a part of your expenses?

A. Yes.

Q. Mr. Johnson, you are the gentleman, are you not, sir, who made the decision not to process Mr. Bowen's grievance for arbitration?

[319] A. True.

Q. I believe, sir, that you had before you at the time, did you not, sir, the file that has been discussed here, that's been put in while you have been present as our Exhibit No. 1?

A. Yes, sir.

Q. You did not of your own or on your own talk to any witnesses in this case, did you, sir?

A. No.

Q. There is reference in the file to certain tapes. I gather, sir, that you did not have those tapes before you?

A. No, I did not.

Q. You did however see reference in the file to the tapes?

A. Yes, sir, there was reference in the file.

Q. And I believe, sir, that your file indicates that you received this file in the National Office on about July 29, 1976, is that correct, sir?

A. True. Yes.

Q. And you had in that file at that time, Mr.—the man who sent it to you, Mr. Kenney, I believe.

A. Right.

Q. And it was Mr. Kenney's recommendation, I think it's been read into evidence that it was Mr. [320] Kenney's recommendation that it be considered and certified for arbitration?

A. True.

Q. Now, I believe, sir, that you have testified that you made the decision on this case on approximately August 16, 1976?

A. 16th or 17th; I'm not sure.

Q. And I believe, sir, if you—No. 27 or Item No. 27 under the grievance documents which I show you, sir, what purports to be a list of grievances that were acted on by a board, I believe it bears the date of August 17, 1976.

A. True.

Q. Is that a copy of the list of grievances that you acted upon that day?

A. Yes, sir.

Q. And Mr. Bowen's case was among them?

A. Yes, sir.

Q. How many cases did you decide, that were on that page, sir, as to whether they should go to arbitration?

A. No cases on this list went to arbitration. No cases that I recommended, now, the Local might have taken it up—taken it to arbitration.

Q. As far as you were concerned on [321] August 17th, 1976, none of the cases that you considered went to arbitration?

A. True.

Q. And I believe, sir, that you have previously been asked how long you spent in reviewing this file?

A. Uh-huh.

Q. And I believe you indicated that it was as best you can remember, and you couldn't remember precisely, but it was fifteen or twenty minutes?

A. Twenty minutes, thirty minutes, somewhere in that area.

MR. POFF: Thank you, Mr. Johnson, no further questions.

THE COURT: Did you have any knowledge of the file, or had you done anything on it before August 16th or 17th?

A. No, sir, I hadn't.

THE COURT: Did it come to you new that morning or you picked it up for the first time?

A. Well, it was dated on the 29th—well, that was the first, you know, when I came—

THE COURT: The first time you had looked at it?

A. —back from Las Vegas, I probably got [322] it that Monday morning or Tuesday morning.

THE COURT: All right.

MR. POFF: May I just a moment?

Q. The other two gentlemen whose names were mentioned at the top of that, a Mr. Newman and another gentleman, Mr.—

A. Mr. Sylvestry.

Q. And neither of those gentlemen had anything to do with this decision?

A. No, sir.

Q. You did not consult with them in anyway about this?

A. No, sir.

* * * *

[341] WALTER THOMAS KENNEY,

a witness called on the behalf of the Defendant, American Postal Workers Union, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GERSH:

Q. Mr. Kenney, would you state your full name for the record, please?

A. Walter Thomas Kenney.

Q. And what is your position with the American Postal Workers' Union?

A. National Vice President of the Clerk [342] Craft, Washington, D.C. Regional.

Q. Do you hold any other elected position, sir?

A. Well, I'm on City Council representing the Sixth District of the City of Richmond.

Q. Now, what are your duties as National Vice President of the American Postal Workers' Union?

A. I have under the constitution of the American Postal Workers Union, the AFL-CIO, jurisdiction over all grievances appealed from the local level to the regional level in representing the clerk craft specifically, covering the states of Maryland, Virginia, West Virginia and the District of Columbia. And I also represent the national union in arbitration hearings on the clerk craft.

Q. Are you familiar with the way in which the American Postal Workers Union and the United States Postal Service select arbitrators.

A. Yes, I am.

Q. Could you please explain to the jury how that arbitration selection procedure works?

A. Well, at the national level, the employer, the U.S. Postal Service and the American Postal Workers Union, they review a panel of individuals who are arbitrators certified under the Federal Mediation [343] Service, and then they strike and each of the U.S. Postal Service regions, they come up with a panel of arbitrators to hear arbitration hearings within that particular region.

Q. And is there a permanent panel that is established for each region to hear all cases?

A. All full-blown arbitration hearings, yes.

Q. And that's a permanent panel so that one arbitrator will be hearing case after case after case for as long as he's on that panel, is that correct?

A. Yes.

Q. Now, in your experience, sir, have you had an opportunity to handle assault cases involving employees that are members of the American Postal Workers Union?

A. Yes, I have.

Q. Are you also familiar with the file in this case, Charles Bowen?

A. Yes, I am.

Q. Now, what factors did you consider important in your review of—what factors do you consider important in your review of assault cases? What do you look for in the file?

A. Well, basically we deal with the notice of removal, the letter or discharge letter as to the [343A] charges, and the facts as to dates, the charge stating in some detail what the employee had allegedly done insofar as assault.

Q. Do you also look for such things as provocation, the mitigating circumstances that might have—

A. Yes, provocation and mitigation.

Q. Now, how successful has the American Postal Workers Union been in winning assault cases at arbitration?

A. We haven't been too successful. I have been handling arbitration hearings for some seven and a half years, and in those instances where the national union has certified cases for arbitration, I would say that ninety-nine and a half per cent of those cases that were heard before the arbitrator that dealt with mitigation or procedural defects insofar as the situation of the way the discharge letter or discipline was imposed.

Q. Is it your answer, sir, that you have not been very successful?

A. We have not.

Q. Now, I would like to call your Exhibit, Tab No. 5 to what has been previously identified as Court Exhibit No. 2, and on the bottom of it, I would [344] like to read—like you to read what appear to be your personal comments with respect to Mr. Bowen's case. Would you read the comments?

A. Yes. Under personal comments and in parentheses, it states Union Representative: "I'm requesting that the APWU Arbitration Board consider, review and certify this case for arbitration."

Q. Would you explain that comment—

MR. POFF: Your Honor, I think that the witness should be permitted to finish reading this.

MR. GERSH: Sure, I'm sorry.

Q. Is there anything else there?

A. "The removal is not for just cause," and I have another notation. "Basically it's a postal inspection service case, yes." That was just informational purposes as far as the last comment.

Q. Now, it was your comment that the American Postal Workers Union should review, consider, and certify this case for arbitration. Do you put that comment in every disciplinary case?

A. That specific language, not necessarily, basically, yes.

Q. And what is it—why do you do that, sir?

A. Well, I'm basically at my level, I have [345] gotten a disposition from management at regional level, and my policy has been that all discharge cases should be reviewed by a higher level of union officials in the American Postal Workers Union which in this instance would be at the headquarters level. And I'm requesting that the respective union officials, a panel of officials would review the case and consider it for arbitration.

Q. Would I be correct in stating, sir, that you do not want the individual responsibility for turning down a discharge case at your level?

A. My personal policy at that time and at the present time was that I believe that any employee who is discharged from the Postal Service should have a final review by the Union as to the merits of the case, and in this instance, at the National level.

Q. So that in virtually every discharge case, you would put a similar comment that the national offices consider in this case?

A. That is correct.

Q. And is that comment a particular expression of yours as to the merits of Mr. Bowen's case?

A. No.

Q. Do you agree, sir, with the decision of [346] Mr. Johnson not to send this case to an arbitrator?

A. Yes, I agree.

Q. Would you explain to the jury why, sir?

A. As I indicated or replied to earlier questioning, earlier under the collective bargaining procedure with the U.S. Postal Service, we as the union representatives, we had to go through work experience and we have, as I indicated earlier, gone to arbitration on assault cases and we weren't successful, and situation based on arbitration opinions and awards wherein we had lost so many cases. I concur with Mr. Johnson's decision not to certify because postal employees are discharged for threats or implied with threats and the arbitrators of uphill management's decision or the action in which they have stated that they had just cause for removing that particular employee.

Q. Can you accurately describe that comment that you placed on the bottom of your regional report as a routine, something routine, so that National could make the ultimate decision?

A. Yes.

Q. Now, in your experience as a regional representative would you estimate, and I realize you don't have the exact number, would you estimate the number of discharge cases you have handled?

[347] A. Well, in the hundreds, I couldn't give you an exact figure.

Q. In those cases, how many of those files that you review do you find some kind of statement or remark that the employee is being harassed by management?

A. Well, I would say in most cases where there is a discharge that the employee will contend that he or she has been harassed in some fashion but nothing specific and the employer feels that that's why management imposed a discipline, perhaps in conjunction with whatever the specific charges are, charge or charges.

Q. Would it then be correct, sir, that the American Postal Workers' Union would be arbitrating virtually every discharge case if we did it simply on statements from some persons that the employee was harassed?

A. Yes.

* * * *

[348] CROSS EXAMINATION

BY MR. JACOBSOHN:

Q. In terms of assault cases, with the Postal Service, now we had that, we had a particular panel, an in-house panel, have you ever seen an assault case that you people have been able to win before any of the Eastern Panel, my particular panel that you and I basically appeared on before?

A. No, I have not, not strictly on the merits.

Q. Now, you reviewed this case. Was any [349] attention paid to the fact that you had an inspection service report?

A. We would certainly review that in detail.

Q. I think that so the jury will understand, and again it is an unusual procedure and you don't have this in any other industry that I have ever heard of, as far as your understanding of the inspection services, is it fair to say that: one, the local inspector does not report to local management?

A. That is correct.

Q. He is, in fact, an independent law enforcement official?

A. That's correct.

Q. And when he does investigations basically the investigations have more weight, let's say, than internal management does.

A. Yes.

* * * *

[350] BY MR. POFF:

* * * *

[353] Q. Now, you have a form, do you not, sir, whereby you can forward grievances on to the Director of Industrial Relations, I believe this is Mr. Anders's office?

A. At that time, it was Mr. Andrews.

Q. I'm sorry, sir, you are right. I've misread, it is Mr. Andrews. All right, sir, I don't believe that you have this before you. I show you, sir, what appears to just be kind of a letter form. Do you recognize it?

A. Yes, I do.

Q. All right, now that is a form, is it not, sir?

A. Yes.

Q. Whereby you simply fill in the blanks. [354] For example, if you will look with me in this case, this is Mr. Bowen's case, isn't it?

A. Yes.

Q. All right, so, all you did was fill in the blanks giving the location and type of discipline and the name of the man, that sort of thing.

A. As far as that particular request for consideration for arbitration.

Q. And it's just the form you filled out?

A. Yes.

Q. Okay. And I take it that this is the normal form that you would use for sending a grievance on to Mr. Andrews' office.

A. Along with the file, of course.

Q. Along with the file, yes. In this case you did sent it along with the file?

A. Oh, in every case.

Q. And in this particular case you also forwarded a so-called APW Union report of regional decisions. Is that correct?

A. That's correct.

Q. Now all that is said on this form, I don't want to stand over the witness all the time, let me hand you that, can you refer to item number four if you would? That's the form that I have been talking about. [355] isn't it?

A. Yes.

Q. And I believe that simply says "I hereby request the APW-AFLCIO arbitration board to consider the above cited grievance arbitration and so on.

A. That's correct.

Q. Now, the report that you filed, and that's item number five in the document that you have THE COURT'S exhibit number two (2). Now this is another form which you have, it gives a place on here for you to make some narrative comments, doesn't it?

A. Yes. The form that I developed myself, personally for my office.

Q. So this is your own personal creation? Now in this case, let me be sure that I'm right. Now on this case, at the bottom are your comments. You said "I am requesting . . ." and you had reviewed the file, incidently, had you not, sir?

A. That's correct.

Q. And had you talked to Mr. Carr at all about it? Or had you just gone on the file?

A. I beg your pardon?

Q. Had you just relied on the file or had you talked to—

A. I had talked to Mr. Carr, I talked to [356] Mr. Romaine about the file.

Q. Mr. Romaine reported directly to you?

A. That is correct.

Q. All right. After doing that and after reviewing the file, am I correct, and you will refer to this phrase, that you wrote this: "I am requesting that the APWU Arbitration Board consider, review and certify this case for arbitration." Is that your language?

A. Yes.

Q. Now, if they certify it—if they consider it for arbitration, they can decide not to arbitrate it or to arbitrate it right?

A. That's correct.

Q. Now, if they certify it for arbitration, they actually take it to arbitration, don't they?

A. They indicate to the Postal Service that the case is being certified, but it doesn't necessarily mean it will go to arbitration, and be heard by an arbitrator.

Q. Well, it can be settled, that's what you are saying?

A. It could be withdrawn.

Q. But if it is certified, and it is not settled and it's not withdrawn, it goes to an arbitration hearing?

[357] A. Yes, sir.

Q. And you have to certify it in order to get an arbitration hearing?

A. Yes.

Q. And so you understood when you used the word certify that you meant that that was to send it, put it on the docket, keep it on the docket for an arbitration hearing?

A. In the form of a request, yes, sir.

Q. And am I correct that you went further and said that the removal is not for just cause?

A. Yes.

Q. Was that your honest opinion at that time?

A. As far as the removal was not for just cause?

Q. Yes. You put it on there. Was that your opinion?

A. My opinion was based on information that I received from the reviewer of the file, Mr. Romaine—

Q. I understand—

A. —and in—in all cases, I have a somewhat different type form now. I would indicate that I don't believe a case has just cause or the discipline has just cause.

[358] Q. You wrote that language, that is not form language though. You wrote that on there, didn't you?

A. Yeah, it was written on another paper, and it was typed by my secretary.

Q. And was it your opinion, at that time—you had access to the same information that Mr. Johnson ultimately had, didn't you?

A. Yes.

Q. As a matter of fact, you had the tapes?

A. That's correct.

Q. You probably listened to the tapes?

A. I listened to one of the tapes.

Q. And after listening to the tapes and reviewing the file, you wrote the comment that we have just heard?

A. Yes, like I do in other cases.

Q. Is it fair to say when you put on there that the removal was not for just cause, was that a formality with you, sir?

A. Basically, yes.

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[361] RECROSS EXAMINATION

BY MR. JACOBSOHN:

Q. Mr. Kenney, if a case is rejected for arbitration at the national level, is there any mechanism by which it can still be heard?

A. Yes, the National Office, our National Office will send out a letter to the local union addressed to the local president, and I receive a courtesy copy, indicating it has been decided not to certify the case for arbitration. And

it further states that the local president has an opportunity to request through the National Office to have the case certified within seventy-two hours. And of course, the local union president is advised to notify the grievant of same.

Q. In this case, the Bowen case, was such a letter sent, if you are aware? Did you receive a copy of such a letter?

A. Yes.

[362] Q. So, in fact, if the local felt for whatever reasons, that Mr. Bowen, the people on the spot felt that for whatever reason that Mr. Bowen really should have his day in court, there was a mechanism by which they could have utilized and gotten that, quote, day in court?

A. That's correct.

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[392] ROBERT. W. CARR

a witness called on behalf of the Defendant, American Postal Workers Union, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GERSH:

Q. Sir, would you state your full name for the record?

A. Robert Weldon Carr.

Q. And do you currently hold a position with the local union, the Local American Postal Workers?

A. Yes, I do.

Q. And what is that position, sir?

A. Local President.

Q. Would you please state generally in your own words what your role in this grievance procedure was? The grievance procedure involving the Plaintiff here, Mr. Bowen.

A. Well, my role as Local President is to receive grievances from my membership and to forward them,

to investigate them, and handle them at what is known as Step-1 and Step-2 and if they cannot be resolved at that point, to forward them on to the National level.

[393] Q. Did you do that in this case?

A. Yes, I did.

Q. What—what best as you can recall steps did you take to assist Mr. Bowen in processing his grievance?

A. I discussed Mr. Bowen's grievance with him; I investigated Mr. Bowen's grievance as best I could, and I then discussed it with management his problem. I could not resolve it, and therefore I sent it to the National Office.

Q. You passed it on to the next step?

A. The next step.

Q. And that would be the Regional level, would that be correct?

A. Correct.

Q. Now, did you have occasion to attend a meeting in Lynchburg at the Holiday Inn, where you were present and Mr. Romaine was present, and Mr. Bowen?

A. Yes, I did.

Q. What was the purpose of Mr. Romaine coming to Lynchburg on that date?

A. The purpose was to try to get some information from Mr. Bowen because prior to this meeting most of my meetings with Mr. Bowen had been [394] in trying to find out what actually happened had been very vague.

Q. When you say vague, do you mean that Mr. Bowen would not tell you what had happened?

A. I would get one story at one time, another story at another. Consequently, I really don't know what the situation was.

Q. Now, was it common practice for the National Office to send a representative down to investigate a case such as this?

A. No, not common practice, no.

Q. Did Mr. Bowen cooperate with Mr. Romaine in his investigation when he was here in Lynchburg?

A. No, as a matter of fact, we tried awfully hard to get him to tell us exactly what the situation was, what actually happened during this alleged assault, and we couldn't get anything out of him whatsoever.

Q. Were you angry at him that night?

A. Quite angry.

Q. What did you do?

A. Well, I became angry because here we had a representative from the national level to come in to try to help him, and he wouldn't cooperate, and I had some harsh words with him.

[395] Q. Now, you have met and talked with Mr. Bowen on any number of occasions, have you not?

A. Yes, I have.

Q. Are you afraid of Mr. Bowen?

A. I think maybe you are asking me if I am physically afraid of Mr. Bowen. No, I'm not physically afraid of anybody. If I'm apprehensive as to what Mr. Bowen might do, I would have to answer yes.

Q. Do you think Mr. Bowen was a threat to his fellow employees?

A. I think there's a great possibility of it.

Q. Would you ever meet with Mr. Bowen in anything but a public place?

A. I would rather not.

Q. Why is that, sir?

A. Well, it's my own personal feelings, but the man is somewhat—he has a tendency at some points to be violent.

Q. Now, when the National Office in the American Postal Workers Union decides not to arbitrate a discharge grievance such as this case, is the Local then given the opportunity to submit the case to arbitration?

A. Yes, they are.

Q. Just explain briefly to the jury how that [396] process works?

A. Well, the National will make a determination as to whether to go to arbitration, and if they decide not to, they then will send us a mailgram or a telegram which gives us about seventy-two hours, I believe, if the Local so desires to take this to arbitration on our own.

Q. Now, in terms of the expenses of the arbitration, if you elected to take this case to arbitration, and you won it, who would pay for it?

A. The National would then pay for it.

Q. And if you lost it?

A. The Local would have to pay.

Q. So that—well, let me ask you this: After the National turned down Mr. Bowen's request to submit this case to arbitration, did the Local then make a decision with respect to this case?

A. Yes, we did.

Q. And what was the decision of the Local?

A. We felt that it was—if in the wisdom of the National if they couldn't win it, then most certainly we weren't prepared to take it to arbitration because we don't have the expertise that the National has. And if the National can't win it, then most certainly we don't feel that we can.

[397] Q. One moment, sir. Did you get a phone call from the United States Postal Service after Mr. Bowen was discharged—excuse me—concerning Mr. Bowen's appearance on the work room floor?

A. Yes, I did.

Q. Would you please explain to the jury in your own words what was related to you?

MR. POFF: If Your Honor please, may we speak to the Court for just a moment?

THE COURT: All right.

(Counsel confers with the Court.)

BY MR. GERSH:

Q. Do you remember my question, sir?

A. I think so, yes.

Q. Let me rephrase it. After Mr. Bowen had been discharged, are you aware of an incident where Mr. Bowen appeared on the work room floor, and you had to be called with respect to that incident?

A. Yes, I do.

Q. Would you explain to the jury what happened?

A. Well, I work at the Miller Park Branch of the Lynchburg, Virginia Post Office. And to the best of my recollection, I got a phone call that Mr. Bowen had gone into the main installation, and had [398] requested to go to his former locker, and to retrieve a jacket I think it was. And after that he came back to the workroom floor, and got into a discussion with one of his supervisors, I believe Mr. Garvey, I believe it was, about some annual leave time that he should have had left on his card. The information that I received was that Mr. Bowen was somewhat intoxicated, and that they tried to talk to him and to get him off the workroom floor, and he would not go. And consequently they had to go to what we refer to as the back office, that is higher personnel to get one of the newer people in the office, a Mr. J. J. Fretus to remove or to ask Mr. Bowen off the workroom floor.

Mr. Bowen then came directly, I guess directly, anyway he came out to Miller Park Post Office where I was working, and I had an opportunity to talk with him then. And I reprimanded him for going to the Post Office, for going there while drinking, and he told me that he would—and I told him to never do that again because he was only hurting his chances, what little chance we did have, and that I didn't want him there anymore, and he promised me that he wouldn't do that anymore.

MR. GERSH: Your Honor, we have no more.

THE COURT: All right, you may cross examine [399] him.

MR. JACOBSOHN: Nothing further, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. POFF:

Q. Mr. Carr, sir, I believe you were and are the Union President?

A. Yes, I am.

Q. And after—of course, you were not present when this incident involving Mr. Morris occurred on February 21, 1976?

A. No, I was not.

Q. It was reported to you by Mr. Bowen that they planned to take some action to terminate him?

A. I think when he received his letter of proposed removal, this is when he came to me.

Q. And he came to you in your capacity as his Union Representative?

A. Correct.

Q. And as his Union Representative, you advised him to file a grievance?

A. Right.

Q. And that grievance under what I believe is Article 15, that's your grievance article in your [400] contract, isn't it?

A. That's true.

Q. And that would be the charge that under Article 15 of the contract, they didn't have just cause to discharge him?

A. That's correct.

Q. And then after that you set about trying to investigate this matter?

A. Right.

Q. And I believe you indicated that Mr. Romaine came in because this was the first discharge case that you hadn't been able to resolve at that—

A. No, no, I didn't indicate that. I really, when once we got the file together and we discussed it, the decision for Mr. Romaine to come in and it would have had to have been made by someone up much higher than myself. The fact that Mr. Romaine did come in, I think was a feather as far as we were concerned. It showed that he was trying to do a job.

Q. And you later went out and you did take a tape? You took a tape interview from Mr. Morris at least?

A. Yes, I took quite a few.

Q. And you took an interview I believe from Mr. Bagby?

[401] A. Yes.

Q. And were there any other witnesses you took a taped interview from?

A. Oh, I took tapes of the supervisors that this thing was reported to: there was quite a few people.

Q. Now, I believe you thought it significant at the time that Mr. Bowen had been accused of kicking Mr. Morris, and you could not in your conversation with Mr. Morris find any verification that Mr. Morris had been kicked?

A. That's correct.

Q. So you forwarded the tapes that you had, or the tape, on up to—well, you gave it to Mr. Romaine I guess?

A. No, no, when I sent my file to Mr. Kenney at the National level, I naturally would send everything that I—all my investigative files to him.

Q. And I believe that you, in this particular case, wrote a special note, did you not, for—let's see, was Walter—was that Mr. Kenney?

A. That would be.

Q. And I believe you wrote a note to him without reading it, well, maybe we had best read it. Do we have the Court file?

[402] THE COURT: Yes. I believe it's Court's Exhibit 2.

MR. POFF: May I approach the witness, Your Honor, please?

THE COURT: All right.

BY MR. POFF:

Q. Mr. Carr, if you will, sir, refer to Tab No. 9. Is that a copy, sir, perhaps not a very good copy, but a copy of the note that you wrote Mr. Kenney?

A. I would think so, yes.

Q. And would you just tell, what did you—just read that to us, sir. It's quite short.

A. (Reading.)

> "Here's the statement of Charles Bowen. I talked with Mr. Perry today, and he is "—it must be of the opinion. I can't get all the way back in there—" that the only valid charge on record is number one, the altercation. "Be sure to listen to the tape of R.B. Morris, also Roland Bagby. I think they may be of great value."

Q. So you sent the tapes along with that?

A. Yes.

Q. And when you sent this matter on to National, you thought you had a strong case to be [403] arbitrated, did you not?

A. I thought that—I thought that I had done my best. I thought that we had a possible chance to win it.

Q. And you were rather surprised to find it turned down?

A. Well, I'm always surprised to find my cases turned down from arbitration.

MR. POFF: All right, sir. Thank you, Mr. Carr.

THE COURT: Any additional questions?

MR. GERSH: I have some, your Honor.

RE-DIRECT EXAMINATION

BY MR. GERSH:

Q. Sir, you have had an opportunity to now review this entire grievance file in this case, have you not?

A. Yes.

Q. Is there anything in those tapes that is not otherwise in the grievance file?

A. No, there wouldn't have been. Mostly the tapes were general conversation, but in my estimation these were, you know, general conversation of the people and actually what they were really admitting to, and admitting not to.

[404] Q. Is there anything different in the tapes that somebody contradicted his affidavit in the tapes in any substantial way?

A. No, I don't think so.

* * * *

[410] DONALD D. JOHNSON,

a witness recalled by the Defendant Postal Workers Union, having been previously sworn, testified:

DIRECT EXAMINATION

BY MR. GERSH:

Q. Mr. Johnson, I wonder if you would either take a look at Court's Exhibit No. 1 or Court's Exhibit No. 2, whichever document or file—

THE COURT: 2 has the tabs.

Q. —Whichever one you feel more [411] comfortable with, and simply go through that file, and tell the jury what you did when you went through the file, what factors you considered important, and essentially do it

as if you were doing it the day you decided not to certify this case for arbitration.

A. Okay, on No. —

THE COURT: Let me have No. 1 and I can sort of follow you as you go ahead with No. 2.

A. Okay.

THE COURT: Do you have No. 1?

A. No, I have No. 2.

MR. GERSH: I can give him my copy.

THE COURT: Oh, no. There's Court's Exhibit No. 1. Okay, that's what I want, Okay.

A. Okay, in order here. No. 1 is just the outside of the grievance folder on which we make notations on whether or not we are taking a case to arbitration. No. 2 is a form letter which gives it—assigns it a APWU national number, the initials of the individual who the case is assigned to, and the type of grievance or discipline, and the name of the grievant. And there's a form letter from our general president to the Postal Service. No. 3 is also another form letter which is addressed to the National Representative or Vice President who handled the case [412] notifying that we have acknowledged receipt of his file, and also has the number up in the right hand corner, plus the name of the grievant, and the location. No. 4 is also a form type letter from the National Vice Persident which states the type of case that it is, the name of the grievant, the regional number and the local representative, the coordinator, and also the management representative for employee relations at regional level.

No. 5 is a form type letter which is used by Mr. Walter Kenney on appeals that he has up to our national office on either the discipline cases or the grievance cases on contract violations. Also he has management comments in here, and also the comments that he puts in here. That he also puts in here. Now, I might say at this point that Mr. Kenney and each one of our national vice presidents each have a different form as to how they send

them up to our level. Some of them might have a whole page of comment; other keep their notations very short. And this is the one that has been presented to you earlier about that he requested that the arbitration board consider, review and certify the case for arbitration. Which I might add is what Mr. Kenney puts in all of his discharge cases.

No. 6 is a letter from the U.S. Postal [413] Service, Mr. Ken Reynolds, addressed to Mr. Romaine, stating that they met on the case, and he has reached the decision that the evidence of record is convincing, that the grievant did assault Mr. R. B. Morris, and the removal is for just cause.

No. 7 is also another form letter which is basically the same thing that was typewritten that this was in the file. That this is what Mr. Kenney had testified to earlier, that he writes this up, hands it to his secretary, and she types it up.

No. 8 is also a form letter, the same thing from Mr. Kenney's office. And on the back of this is comments made by Mr. Romaine in reference to the individuals which were—that he had discussed the case with on his investigation at the Lynchburg Office.

Q. Now, Mr. Johnson, if I may ask you, what weight do you give to these types of comments that have apparently been made by employees at the installation?

A. If they are—

Q. —for example there is a comment there about some guy named Bill Jones saying that Frank Murray was out to climb a tree or something. How much weight do you give to those kind of comments [414] in making your decision?

A. Well, on these type of comments, I don't put that much weight on these type of statements. For one reason, when you get in front of an arbitrator, an affidavit signed by an employee carries much more weight than a personal note from either an employee or a personal note as this is from the Union representative.

Q. Well, what about—is there any, in your experience, sir, is common or uncommon for there to be notations in the file about harrassment, etc.?

A. I would say that in the majority of cases on discharge, whether it be for assault, insubordination, or whatever the case might be, that in ninety-five or even better per cent of those cases, the employee puts this type of statement one way or the other into his file, that he is being harrassed by management.

Q. Does he ever get other employees to make such statements?

A. Certainly, if you have—it's just human nature, if you are working on the work room floor, and the man comes along and decides he is going to fire you, that you are going to get out and get your friends, or whoever it is, to sign the various statements saying [415] that this man has been picked on or whatever the case may be.

Q. Let's go through the file; let's move on to Tab No. 9, sir.

A. No. 9 is a note to Walter from Bob Carr, stating that Mr. Perry—wait a minute, that was the one where the only valid charge that he considered was No. 1 on the altercation. And he said, "Be sure to listen to the tape of R.B. Morris, also Roland Bagby, and I think they may be of value."

No. 10 is a letter from the grievant to the Postmaster explaining his point of view as to what happened and occurred on that night about the charges.

No. 11 is another form letter which is sent back to the Local from the vice president requesting additional information or documentation to support the grievance file.

No. 12 is a letter from Bob Carr to Walter Kenney concerning the procedure set forth in the M-5 handbook on schemes which was part of the charge.

13 was a letter addressed to the Regional Director of Employee Relations, U.S. Postal Service, in the Philadelphia region, by Robert Carr appealing the Postmaster's decision.

[416] Q. A lot of these are just procedural forms, is that not correct?

A. True.

Q. And with these forms, do you—I mean how many grievance files have you reviewed?

A. In the last six years, seven years?

Q. Yes.

A. Probably over fifteen or twenty thousand.

Q. And most of these forms you are very, very familiar with. You don't—do you have to sit in there, for example, let's go to let's say Form No. 4, for example. Would you flip back to Form No. 4; now, do you have to spend a lot of time reading that, figuring out what it is?

A. No.

Q. How many of those have you seen?

A. Thousands.

Q. They are sort of procedural forms?

A. Yes, they are.

Q. They don't contain any substance—

A. No.

Q. —having to do with this case, is that right?

A. None, whatsoever.

Q. Now, let's see. Where are we?

[417] A. We are back at—

Q. Fourteen?

A. 16, aren't we?

Q. All right, let's go to 16. What is 16, sir?

A. 16 is a letter, the Postmaster's letter of decision to Mr. Bowen stating that—notifying him that he is going to go ahead with removal charges, and also that his rights to appeal to the Civil Service Commission or through the grievance arbitration procedure.

Q. Now, in here it says, and I am quoting, "I have given full consideration to the information given in your personal answer of March 19. I find the reasons stated

in Notice of Charges in paragraph one through three, fully supported by the evidence."

Okay, now, what is the next thing you would want to look for?

A. Well, then I—because Walter had marked this as a Postal Inspector's case, I would then look for the Postal Inspector's report, which I don't know what the—what tab number you have on that particular thing.

Q. Would you want to go look at—take a look at the actual charges themselves first?

A. Yes, that would all be taken into [418] consideration.

Q. All right, then let's look at No. 20, sir?

A. No. 20. Okay—

Q. That document dated March 15, 1976 containing the three charges, that is what, sir?

A. That's the notice of removal. That's the charges that were given him though, and the first reason that they were trying to get rid of the employee, and then the following—

Q. The actual notice of charges?

A. That's the notice of charges, right.

Q. Now, let's see if we can't find a Postal Inspector's form here. It appears to—apparently there's a cover letter to form, Tab. No. 22, is that correct, sir?

A. Yes, that's the one from Postal Inspector Via to Mr. John Ripley, Postmaster.

Q. All right, let's turn to No. 23 which is an actual investigative memorandum itself. Now is this a document you would want to pay some close attention to?

A. Certainly.

Q. Why is that, sir?

A. Well, through the years, we have found that the inspection case, the inspectors are very [419] thorough in their investigation, and generally with the investigative memorandum from the Postal Inspector, they also have signed affidavits from any of the employees who were actually involved and saw anything.

Q. Now, is this a—these affidavits, the actual affidavit of Mr. Morris, the affidavit of Mr. Bowen, Ms. Paris, Mr. Verdinella, Mr. Doss, did you read through these?

A. Yes, I did.

Q. Approximately just looking through them now, how long would it take you to read through these affidavits?

A. It shouldn't take me no more than about, I would think about ten minutes, if that long, to go through them.

Q. Now, did you find anything here or you've heard anything in court today that would suggest to you that you should have changed your decision, and submitted this case to arbitration?

A. No, on the contrary. I think I did right. More so now.

Q. Would you do the same thing again, sir?

A. Yes, sir, I sure would.

MR. GERSH: One moment, Your Honor.

Q. How long would you estimate since we have [420] picked up this file together, and started reading it, how—just that part of your testimony, how long have you been on the stand?

A. Ten minutes, fifteen.

Q. Do you think you've reached a conclusion concerning Mr. Bowen's propensity for violence?

A. Yes.

Q. And what is that conclusion?

A. I don't think that the gentleman should be working in the Post Office with his fellow workers.

Q. You don't think he should.

A. No.

MR. GERSH: All right, no further questions.

THE COURT: Did you play the tapes at the time you made your decision?

A. No, sir, I did not.

THE COURT: You did not?

A. No, sir.

THE COURT: Did you think about getting them or did you—

A. No, sir, I did not.

MR. GERSH: Your Honor, I do have one more question.

THE COURT: All right.

Q. Now you are familiar with the arbitrators [421] that the American Postal Workers Union and management were using at the time?

A. Yes.

Q. What kind of decisions had the Union been reaching, been receiving in cases like this where we did attempt to take the case to arbitration?

A. Negative decisions, and this ranged anywhere from Arbitrator's Willingham's, Dash, Serus, Fellman, and these cases had been heard all over the country.

Q. Are these arbitrators that you just mentioned, are these the arbitrators that were being used in the region at that time?

A. Some of them were, yes.

Q. Who is that?

A. Dash, Serus, Cushman; I don't know whether Fasser was being utilized at that time or not.

* * * *

[423] Q. Are the arbitrators that—in the years that you have been with the American Postal Workers' Union dealing with these arbitrators, did that impact your decision?

A. It most certainly did.

Q. And in terms, how did it impact on your decision?

A. We have an obligation to represent the members of the Union and even non-members, and not [424] for someone, if we did not make a decision, and we took the course of what has been expressed by some people in the court that because they pay dues that their case must go all the way to the top would be a farce in my opinion to the collective bargaining system. It would break a union; this would mean every case, whether a guy was mis-throwing the mail, insubordination or whatever it

might be, it would place the Union in the position that we would go broke. And we have to think about not only the guy who got in trouble, but his fellow workers and the other people that's footing the bill.

MR. GERSH: Thank you very much, Mr. Johnson.

MR. JACOBSOHN: I have no questions, Your Honor.

CROSS EXAMINATION

BY MR. POFF:

Q. Mr. Johnson, I will try to be very brief in the interest of time. I think we've been over some of this. But the file that you have gone over it and recited something from it in part, also had in it the letter from Mr. Wright, did it not?

A. Yes, it did.

Q. And it was a rather strong statement to [425] say the least on behalf of Mr. Bowen, was it not?

A. It was, yes, sir. With the exception of the last paragraph.

Q. And you also saw that there was a statement that Mr. Romaine or statements of Mr. Romaine had taken from various witnesses himself?

A. True.

Q. Statements that a—at least oral statements that he's capsuled for you in writing, in his own handwriting?

A. True.

Q. And among those employees was an employee by the name of Roland Bagby, was there not?

A. Yes, sir, it was.

Q. And it indicated in Mr. Bagby's statement that Mr. Bowen was average in performance, that he always did his work, and he was a quiet manner, and he was usually by himself, and he was always a gentleman, referring to Item No. 8, Tab No. 8 in that document. Do you recall that, sir?

A. Yes, sir.

Q. And that he heard quite a few different people called stupid by Mr. Morris, and says that he will swear if called upon that Frank Murray, the supervisor, said that he was going to get rid of Bowen [426] one way or the other. That was in there, wasn't it?

A. Yes, sir.

Q. And Mr. Bagby also said that he was ordered to check Mr. Bowen's case night after night. Is that right, sir?

A. Yes, sir.

Q. One of the items that Mr. Bowen was charged with was some scheme failures, wasn't it?

A. Yes, sir.

Q. And the way you find out about scheme failures is to check his case, it may not be a scheme failure, but the way you—

A. Either check his case, or when he comes up for an annual scheme examination.

Q. All of this evidence was in there when you reviewed it?

A. Yes, sir.

Q. Plus everybody up to that point had recommended that it be certified for arbitration?

A. Up to that point, yes, sir, they did.

* * * *

[427] RE-DIRECT EXAMINATION

BY MR. GERSH:

Q. Now you had mentioned that you had received in discharge cases this kind of formal recommendation from Mr. Kenney?

A. Uh-huh.

Q. Now, was that in your mind an actual recommendation that the case be arbitrated, or only that you give it some consideration?

A. I have always taken it that it just places me in the position for me to consider the case to whether or not it will go into arbitration?

Q. Did you consider this some kind of actual strong recommendation by Mr. Kenney that this case necessarily be arbitrated?

A. No, I did not.

THE COURT: Mr. Johnson, was the letter of April 27th, '76, written by Mr. Robert W. Carr, did you have that before you?

A. Yes, sir. You have the file that I had at the time.

THE COURT: All right, the Court will ask you to read out loud to the jury that letter, and then explain what significance, if any, you placed on that.

A. (Reading.)

[428] "Dear Walter:

> Enclosed is a case history on Charles Bowen. As I have stated to you on other occasions, the charges here with the exception of Charge No. 1, deals mainly with procedure set forth in the M-5 Handbook on schemes. Charge No. 1 cannot really be substantiated since there were no witnesses to the alleged altercation, and Mr. Bowen claims he never touched Mr. Morris.
>
> "Mr. Morris' statement to me differs completely in that of the sworn statement he made to the Inspector Via. I am enclosing tapes of the conversation I have had with that what I feel was key personnel in this matter.
>
> "Please feel free to call me on any of this. Thanks for your time and efforts. I remain fraternally, Robert W. Carr, President."

THE COURT: Do you understand that letter to say that the tape that he had taken from Mr. Morris was entirely different from the statement that he had given to Mr. Via? Isn't that what that letter says?

A. Well, now—it could lend, you know, to that.

THE COURT: Well, does it say anything else?

[429] A. No, sir, it doesn't.

Q. All right, then, you still didn't think the tapes were significant?

A. No, sir, I didn't.

* * * *

RECROSS EXAMINATION

BY MR. JACOBSOHN:

Q. In terms of the material you have in front of you, and you had the Inspector's file, was there anything in the file, in your opinion, that somebody who's dealt with the inspection service in the [430] Postal Service, was there anything in the file that could contradict a sworn affidavit by postal, taken by the Postal Inspector?

A. No, I found none in there.

Q. And this is based on not this case, but on a multitude of other cases in the past?

A. Yes, sir.

* * * *

[485] DONALD D. JOHNSON,

a witness recalled by the Court, having previously been sworn, testified as follows:

BY THE COURT:

Q. He's been sworn. You understand that you are still under oath?

A. Yes, sir.

Q. I want to ask you one question, and it's more or less a hypothetical. If you had certified this case for arbitration, and it would have taken the usual time to arbitrate the matter, when would you have anticipated a decision one way or the other from the arbitrator? Do you understand the question?

[486] A. Yes, sir.

Q. Right.

A. That would depend, Your Honor, on the number of cases which would have been logged in or docketed for that particular area.

Q. All right, could you tell the Court and jury the usual length of time from the time that you certify a case for arbitration until the arbitrator hands down a final binding decision.

A. On discharge cases, we are talking anywhere from a period that could be six months and a year.

Q. You would anticipate six months from a year?

A. Yes, sir.

Q. From the time you would have certified it?

A. Yes, sir.

THE COURT: All right, now let me call the Representative for the Postal Service to the stand.

KEN REYNOLDS,

a witness recalled by the Court, having been previously sworn, testified as follows:

BY THE COURT:

Q. I want to ask you the same question. You [487] handle Labor and Management Relations. Had this—had the Union certified this case for arbitration and gone to arbitration, and taken its usual place on the Docket and run its usual course, when would you, in the light of your experience, have anticipated a decision from the arbitrator.

A. Anticipated a decision after it gone—

Q. After it had been—

A. At that particular time there was a pretty substantial backlog of cases, and to the best that I can remember from the time an action was taken, we were running around a year.

Q. You would say approximately a year?

A. Approximately a year, yes, sir.

• • • •

[EXCERPTS FROM COURT EXHIBITS 1 AND 2]

[SEAL]

AMERICAN POSTAL WORKERS UNION, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005

[LABEL]

July 29, 1976

E3-VA-211-D
USPS Reg. Number: Lynchburg, Va.-21
APWU Number: 8705(DJ)
Grievance or
Discipline: D—Discharge
Name: Charles Bowen
Location: Lynchburg, Va.

Mr. James V. P. Conway
Senior Assistant Postmaster General
Employee & Labor Relations Group
U.S. Postal Service
Washington, D.C.

Dear Mr. Conway:

The American Postal Workers Union requests arbitration on the above disciplinary case in accordance with Article XV, Step 2.b.

Sincerely,

/s/ Francis S. Filbey
FRANCIS S. FILBEY
General President

[SEAL]

AMERICAN POSTAL WORKERS UNION, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005

[LABEL]

July 29, 1976

E3-VA-211-D
USPS Reg. Number: Lynchburg-21
APWU Number: 8705(DJ)
Grievance or
Discipline: D—Discharge
Name: Charles Bowen
Location: Lynchburg, Va.

Mr. Walter T. Kenney
National Vice President
APWU, AFL-CIO
294 East Clay St., Room 308
Richmond, Virginia

Dear Brother Kenney:

This will acknowledge receipt of the file submitted on behalf of the above aggrieved employee.

This file will be considered by the Arbitration Board, which has been established within the American Postal Workers Union.

Sincerely and fraternally,

/s/ Emmet Andrews
EMMET ANDREWS
Director
Industrial Relations

cc: R. Carr

[SEAL]

AMERICAL POSTAL WORKERS UNION, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005

[LABEL]

Jul. 27, 1976

Mr. Emmet Andrews
Director, Industrial Relations
APWU, AFL-CIO
817 - 14th Street, N.W.
Washington, D.C.

SUBJECT: *REQUEST ARBITRATION*:

Re: U.S.P.S. Reg. #E3-VA-211-(D)
Lynchburg, VA-21

Disciplinary Action: Discharge Case

Name: Charles Bowen

Location: Lynchburg, Virginia

Clerk Craft

Local # None

Date: July 24, 1976

Dear Emmet:

I hereby request the APWU, AFL-CIO, Arbitration Board to consider the above cited grievance appeal for arbitration in regards to an Adverse Step 2B decision letter, dated July 14, 1976, in which I received on July 20, 1976.

My reasons for making this request are included in my Union Report of the Step 2B Hearing.

With kindest personal regards, I remain

Sincerely and fraternally,

/s/ Walter T. Kenney
WALTER T. KENNEY
National Vice President

CC: Local Representative
Robert W. Carr, President

APWU Eastern Regional Coordinator
Robert P. Kephart

Regional Assistart Postmaster General for Employee & Labor Relations, Eastern Region
Mr. Jack West

APWU UNION REPORT OF REGIONAL DECISION

Step 2B

E3-VA-211-(D)

Local None

U.S.P.S. Reg. No. Lynchburg-21

APWU Reg. #623—W.T.K.

Meeting Date: 5/28/76 Date of Violation: 3/15/76

Article(s) Violated: XVI

Grievant(s): Charles Bowen Seniority Date: 4-27-74

Local (APWU): Lynchburg, Va. Local Rep.: R. W. Carr

APWU Regional Representative: Walter T. Kenney

Enclosures—Local's Grievance Form:

Yes ( ) No ( )

Letter of Charges: (Date) 3/15 or 30/76 Counselling:

Yes ( ) No ( )

Letter of Warning: Yes ( ) No ( ) Suspension:

Yes ( ) No ( )

Discharge: Yes (X) No ( ). Step 1 Filed Date 3/19/76 Denied Unknown

Nature of Grievance: Grievant issued a Notice of Removal letter dated 3/15/76 and Letter of Decision dated 3/30/76 without just cause. Charges: Physically assault on 2/21/76.

Immediate Supervisor's Comments: None

Step 2 Appeal (Date) 3/31/76 Denied: 4/12/76

Postmasters Comment's: None

Step 2B or 3 Appeal (Date) 4/22/76 Step 2B or 3 Decision (Date 7/14/76

Step 2B or 3 Appeal File Received: 5/3/76

Disposition: Denied (X) Sustained ( ) Resolved ( ) Withdrawn ( ) Remand to Local ( )

Regional Management's Comments: The removal of this employee is for just cause under the discipline procedure.

Personal Comments: (Union Representative) I'm requesting that the APWU Arbitration Board consider, review and certify this case for arbitration. The removal is not for just cause.

(X) Postal Inspection Service Case—Yes

July 14, 1976

Mr. Cecil Romine
Regional National Representative
APWU
P.O. Box 2080
Parkersburg, WV 26101

Re: E2-VA-211(D)
Lynchburg, VA-21
Bowen APWU

Dear Mr. Romine:

We met May 20, 1976 to discuss the subject grievance at Step 2B of our contractual grievance procedure. We mutually agreed to extend the time limits to allow the Union time to submit additional information.

All the information presented at our meeting, and in subsequent telephone conversations and letters, has been carefully considered.

The evidence of record is convincing that the grievant did assault R. B. Morris. The removal is for just cause and the grievance is denied.

Yours truly,

Ken Reynolds
District Director
Employee & Labor Relations

cc:
SC Manager
LRD, Region (2)
F
R
C

APWU UNION REPORT OF REGIONAL DECISION

Step 2B

USPS Reg. No. E-3-Ha-211D
Lynchburg-21

Local ———

APWU Reg. #3 CFR

Meeting Date: 5/28/76 Date of Violation: 2/21/74

Article(s) Violated: XVI

Grievant(s): Bowen Seniority Date: 4/27/74

Local (APWU): Lynchburg, VA Local Rep: Carr

APWU Regional Representative: Cecil F. Romine

Enclosures Local's Grievance Form: Yes (X) No ( ) (3/30/76)

Letter of Charges: (Date) 3/15/76 Counselling: Yes ( ) No ( )

Letter of Warning: Yes ( ) No ( ) Suspension: Yes ( ) No ( )

Discharge: Yes (X) No ( ) Step 1 Filed Date 3/19/76 Denied

Nature of Grievance: Grievant issued letter of removal for physically assaulting another employee

Immediate Supervisor's Comments:

Step 2 Appeal (Date) 3/31/76 Denied 4/12/76

Postmasters Comments:

Step 2B or 3 Appeal (Date) 4/22/76 Step 2B or 3 Decision (Date ————)

Step 2B or 3 Appeal Filed Received:

Disposition: Denied ( ) Sustained ( ) Resolved ( )
Withdrawn ( ) Remand to Local ( )

Regional Management's Comments:

Personal Comment: (Union Representative) Penalty too harsh. I did not question the fact whether the act took place or not. The statement of the employee and his condition shows *something happened.*

R. B. Morris

He said he was grabbed by shirt collar and shoved but couldn't say for sure he was kicked. Also couldn't remember whether any words were exchanged on steps.

Kathleen Paris

Scuffling sound was Bowen scuffling his feet at the time clock.

Rolland Bagby Distribution and Review Clerk

Powen average in performance, always did his work in a quiet manner and usually by himself and always a gentlemen. Heard quite a few of different people called stupid by Morris. Says he will swear if called upon that Frank Murray (Supr.) said that he was going to get rid of Bowen one way or the other.

He was ordered to check Bowen Case night after night.

Bill Jones—Tour Supt. in talking to me made following statements.

1. That Frank Murray would rather climb a tree to tell a lie than stand on the ground and tell the truth.

2. Morris was noted for picking on employees and bad mouthing them.

3. Morris he believed had been counseled for doing this.

• • •

5/3/76

Walter.

Here is the statement of Charles Bowen. I talked with Mr. Berry today and he is of the opinion that the only valid charge on record is #1, the altercation. Be sure to listen to the tape of R. B. Morris. Also of Roland Bagby. I think they may be of great value.

Thanks,
Bob

RECEIVED

May 5, 1976

W. T. K.

Subject: Notice of Charges—Removal

Mr. John D. Ripley, Jr.
SCF Manager/Postmaster
Lynchburg, Virginia 24505

Dear Mr. Ripley:

The following is written as a response to your letter of March 15, 1976, concerning Paragraph 1.

1. On February 21, 1976, I am charged with physically assaulting Mr. R. B. Morris by kicking him down the steps, resulting in Mr. Morris suffering abrasions on his face, knocking his glasses off, bending the frames and scratching his bifocals. This is my recorded statement concerning any alleged altercations between Mr. Morris and myself. On Friday, February 20, 1976, while working on the State Primary, I noticed that Mr. Morris was unusually caustic in some of his remarks while working around my Primary Case. It seemed to me to be quite out of line for him to make such remarks, as it was not necessary in order for him to perform his duties. He persisted in these remarks, namely by saying that I was dumb and that in fact, that there was only one man dumber in the Post Office than I and that was Frank Murray, who is Tour Foreman. This, in fact, did affect my work because it tended to build an atmosphere of tension. Those caustic remarks were made by Mr. Morris without any provocation on my part and seemed to be way out of line for any person with rational thinking. While this was witnessed by several around me who were working this section, nothing was said until about 9:40 p.m. when upon pulling the Primary in order to dispatch the mail, I came in contact with Mr. Morris again, at which time he persisted in talking to me in a rough tone and at this point called me a son-of-a-bitch. After helping pull the North Pouch Rack, around 9:55 p.m., I was on my way to work on the SCF mail in the basement and

I approached Mr. Morris in a very quiet manner and asked him as politely as I could if he would refrain from calling me such names and then I proceeded to go on to the basement. At 10:55 p.m. while working Sectional Center mail in the basement, Mr. Bill Jones, supervisor, came over and told us that all part-time flexibles could go home at 11:00 p.m. At this time I reported to Mr. Jones the incident with Mr. Morris and his response was that Mr. Morris called anyone that. On the following day, which was Saturday, February 21, 1976, I reported to work at 3:30 p.m. and while working on the Primary, Mr. Morris came over and started the same abusive language again. At this time, it was approximately 3:50 p.m. and feeling the tension of the causticity and suffering from fluid on my right knee, I asked the supervisor if I could go home because of sickness. I was told to pull my card and punch out. I got my sweater and proceeded down the stairway to my car by way of the back loading dock. It was at this time in the stairway that I again saw Mr. Morris when he was coming from the restroom and/or the Break Room. At no time during this brief encounter did I shake or kick Mr. Morris or scratch or bend his glasses. In fact, if there was any body contact made, Mr. Morris would have made it with me while approaching the first two or three steps. At this point and time, Mr. Morris asked me where I was going and I told him that I didn't care to talk to him and that I was going home. He followed me to the back dock and at this time he asked me not to go and lose a day, that he didn't think I was such a "bad fellow" and that he would like to have me out to his house for dinner sometime. Thinking that he was sincere, I accepted this as an apology and proceeded on to my car.

2. and 3. Paragraph 2 of your letter dated March 15, 1976, states "On January 31, 1976, Mr. E. R. Garboe, III, Tour 1, Supervisor, and Mr. R. L. Allen, Tour 1, Distribution and Review Clerk, reported your failure on clean case qualification on City Primary A. You were

given a 30-day notice to qualify on same, and you failed to report and have not qualified to date." In Paragraph 3 of your letter dated March 15, 1976, it states "You failed to report for your regular scheme examination on City A. You were given a failure and re-scheduled for April 2, 1976." The record should be corrected to show that I was given a check on Primary A on January 31, 1976, by Mr. R. L. Allen, Tour 1, Distribution and Review Clerk, and that after determining that I had missed over 5% of the mail checked, was given notice that I would be checked again in two weeks, thus making January 31, 1976, the wrong date for a 30-day check. And, of course, after being held off from work by Mr. T. O. Montgomery since February 24 makes it impossible to report and to qualify. On February 28, 1976, by letter addressed to the Postmaster, I asked for an extension for this examination because of sickness and it was denied. Both Paragraphs 2 and 3 of your letter dated March 15, 1976, are incorrectly stated; and my regular scheme examination on City A is not due until September 27, 1976.

Respectfully submitted,

/s/ Charles V. Bowen
CHARLES V. BOWEN
5-3-76 RHC

cc: A.P.W.U.
Personnel File

[SEAL]

AMERICAN POSTAL WORKERS UNION, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005

[LABEL]

Article(s) XVI.
Step 2B or 3 Discipline
Grievant Charles Bowen
Loction Lynchburg, VA.
Local Union # None
Date: May 3, 7976
623-W.T.K.

Dear Bob:

I wish to acknowledge receipt of the above grievance appeal with file dated April 22, 1976.

It is very important that I receive the following information where checked in red pencil mark.

1. ✓ Step 1 filed and denied.
2. ☐ Legible copy of original grievance form.
3. ✓ Documentation to support the grievance. (Grievant's reply to Notice of Removal Letter in writing.
4. ☐ Local Union's position paper.
5. ☐ Appeal letter of immediate supervisor's verbal decision to installation head.
6. ☐ Letter of decision from installation head.
7. ☐ Statement of summarization of those points not revealed in the file especially made by management.

8. ☐ Copy of appeal letter to Regional Director for Employee & Labor Relations, Eastern Region, U.S. Postal Service, P.O. Box 8601, Philadelphia, Pa. 19101

Sincerely and fraternally,

/s/ Walt
WALTER T. KENNEY
National Vice President

P.O. Box 1345
Lynchburg, Virginia 24505
April 27, 1976

Mr. Walter T. Kenney
214 East Clay Street
Richmond, Virginia

Dear Walter:

Enclosed is the case history on Charles Bowen. As I have stated to you on other occasions, the charges that are here, with the exception of charge #1, deals mainly with the procedures set forth in the M5 Handbook on schemes. Charge #1 cannot really be substantial since there were no witnesses to the alleged allocation and Mr. Bowen claims he never touched Mr. Morris. Mr. Morris' statement to me differs completely from that of the sworn statement he has made to Inspector Bye.

I am enclosing tapes of conversation I have had with what I feel were key personnel in this matter. Please feel free to call me on any of this.

Thanks for your time and efforts. I am,

Fraternally yours,

ROBERT W. CARR
President
Lynchburg, Virginia
Local APWU

April 22, 1976
Charles Bowen
Subject: Appeal to step 2B

Regional Director
Employee and Labor Relations
U.S. Postal Service
Eastern Region
Phil., Pa.

Dear Sir,

We here-by appeal the decision of Mr. John D. Ripley, Postmaster of the Lynchburg, Va. Post Office in regards to the discipline action taken against Mr. Charles Bowen a distribution clerk of the Lynchburg, Va. Post Office.

As per the the provision of Art. 15 Sect. 2B of the National Agreement, we here-by request a hearing at the earliest convenience.

An immediate response to this request, by you, will be greatly appreciated.

Thank you for your consideration in this matter. I am,

Sincerely yours,

/s/ R. W. Carr
ROBERT W. CARR Pres.
Lynchburg, Va.
Local A.P.W.U.
(AFL-CIO)

Date: 04-12-76
P.O.CL. 1

OUR REF:

JDRipley/jr:clm

SUBJECT:

Grievance Appeal Step 2A
File # Lynchburg 76-34

R. W. Carr, President BR A.P.W.U.
P. O. Box 1414
Lynchburg, Virginia 24505

This refers to grievance appeal dated March 31, 1976, submitted by Mr. R. W. Carr, President Local A.P.W.U., on behalf of Mr. Charles V. Bowen, Part-time Flexible Clerk, relative to an alleged violation of Article XVI of the National Agreement.

This grievance is denied.

/s/ John D. Ripley, Jr.
SCF Manager/Postmaster
Lynchburg, VA 24505

Certified #711511
Return Receipt Requested

March 31, 1976

Mr. John D. Ripley, Postmaster
Lynchburg, Va. Post Office
Lynchburg, Va. 24505

Sub: Violation of Art. 16 of the National Agreement.

Dear Sir,

We here-by appeal the decision of Mr. William Jones, supervisor tour 3 of your post office. Mr. Jones denies that management has violated Art 16 of the National Agreement when they failed to show just cause in the proposed removal of Mr. Charles Bowen.

Enclosed is a copy of the formal grievance as well as supporting documents.

An early resolution as well as the adjustment requested would be greatly appreciated.

Sincerely yours,

/s/ Robert W. Carr
ROBERT W. CARR
President
Lynchburg, Va.
Local A.P.W.U.

cc: File

UNITED STATES POST OFFICE

SPECIAL DELIVERY—Certified Mail—
Return Receipt Requested—Restricted Delivery

DATE: March 30, 1976

P.O.C.L.

OUR REF: JDR:JDC:plb

SUBJECT: Letter of Decision

TO: Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, Virginia 24502

By notice of March 15, 1976, you were informed of a proposal to remove you from the U. S. Postal Service.

I have given full consideration to the information given in your personal answer of March 19, 1976. I find that the reasons stated in the Notice of Charges, paragraphs 1 through 3 are fully supported by the evidence and warrant your removal to promote the efficiency of the Service. It is my decision, therefore, that you be removed effective April 20, 1976. In reaching this decision, I have considered the elements of your past record as set forth in the Notice of Charges, dated March 15, 1976.

You have the right to appeal to the Federal Employee Appeals Authority, Civil Service Commission immediately, but no later than 15 days after date of receipt of this letter. If you desire to appeal to the Commission, your appeal should be sent to Chief, Appeals Examining Office, U. S. Civil Service Commission, Washington, D.C. 20415. Your appeal to the Commission must be in writing and give reasons for contesting the action with any offer of proof and pertinent documents you are able to submit.

If you appeal to the Civil Service Commission, you thereby waive access to any procedures under the National

Agreement beyond Step 2B of the Grievance-Arbitration Procedures. If you appeal to the Civil Service Commission, a copy of the appeal should be sent to the undersigned.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, VA 24505

cc:

Personnel File
Personnel Office
A.P.W.U.
Postal Inspector

P.O.B. 1414
Lynchburg, Va. 24505

Mr. Lewis Perry, E.E.O. Specialist
P.O.B. 12024
Roanoke, Va. 24022

Dear Sir,

In accordance with the provisions set forth in the E.E.O. program, I here-by charge Mr. Frank Murray, supervisor tour 3 of the Lynchburg, Va. Post Office with discrimination because of my religion.

I believe Mr. Murray has discriminated against me in the process of my employment and in the investigation of an alledged altercation between Mr. R.B. Morris and myself.

My representative is Mr. Robert W. Carr, president of the Lynchburg, Va. Local A.P.W.U. It is my desire that Mr. Carr be present at all discussions and subsequent hearings.

Thank you for your cooperation in this matter I am,

Sincerely yours,

/s/ Charles V. Bowen
CHARLES V. BOWEN
Clerk
Lynchburg, Va. Post Office

cc: Postmaster
file

NAME: Bowen, Charles V.

ADDRESS: 4500 Hilltop Dr., Lynchburg, Va. 239-8321

POSITION: Clerk. JOB TITLE: Part-Time Flex.

Existing situation (please specify in detail): Management of the Lynchburg, Va. Post Office has committed a violation of Art. 16 of the National Agreement in their failure to show just cause for the proposed removal of this employee. Removal letter dated 3-15-76.

Corrective action (requested and reason): That employee be made whole and that all charges be dropped. In investigating these alleged offenses has shown that management is using an alleged altercation with another employee as the basic reason for this dismissal.

Summary of effort made to resolve grievance informally: Union President has spoken with management after an investigation into all matters pertaining to this proposed removal and no action has been made by management to resolve this grievance informally.

Person(s) involved (give full names and position. If no specific person, please state management).

Management and Mr. Frank Murray.

I Charles V. Bowen do issue this as a formal complaint against the person(s) named above on this date of 3-17-76.

/s/ C. V. Bowen

ROANOKE ORTHOPEDIC CLINIC
1240 Third Street, S.W.
Roanoke, Virginia 24016

March 16, 1976

TO WHOM IT MAY CONCERN:

Re: Mr. Charles V. Bowen

This is to certify that the above-named patient will be able to return to his regular employment on Wednesday, March 17, 1976.

/s/ George D. Henning, M.D. (gac)
GEORGE D. HENNING, M.D.

GDH/gac

UNITED STATES POST OFFICE

Special Delivery—Certified Mail—
Return Receipt Requested—Restricted Delivery

DATE: March 15, 1976
P.O.C.L.

OUR REF: JDR:JDC:plb

SUBJECT: Notice of Charges—Removal

TO: Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, VA 24502
804-239-8321

SSN 223-38-6770
Part-Time Flexible Clerk

This is notice that it is proposed to remove you from the Postal Service no earlier than 30 days from the date you receive this notice. The reasons for this proposed action are:

1. On February 21, 1976, at approximately 4:00 PM, you physically assaulted Mr. R. B. Morris, Jr., Dispatch Expediter, by grabbing him by the shirt collar and shaking him, and then pushing him down the steps with your foot, resulting in Mr. Morris suffering abrasions on the side of his face, knocking his glasses off which bent the frames and scratched the bifocal lens. When Mr. Morris bent over to pick up his glasses, you kicked him.

2. On January 31, 1976, Mr. E. R. Garbee, III, Tour 1, Supervisor, and Mr. R. L. Allen, Tour 1, Distribution and Review Clerk, reported your failure on clean case qualification on City Primary A. You were given a 30-day notice to qualify on same, and you failed to report and have not qualified to date.

3. You failed to report for your regular scheme examination on City A. You were given a failure and re-scheduled for April 2, 1976.

The following elements of your past record will be considered in determining the disciplinary action to be imposed, if the charges are sustained:

1. Leter of Warning and Counseling, dated June 5, 1975, for miscellaneous deficiencies (changing schedule without approval, not reporting for duty as scheduled and scheme failures).
2. Counseling by the Director, Mail Processing, dated July 24, 1975, concerning this failure to report for duty as scheduled and scheme failures.
3. Conference with Management and Union Officials on September 26, 1975, concerning the continued unsatisfactory performance of your duties.
4. Proposed Letter of Suspension, dated October 2, 1975, Scheme Failures.
5. Letter of Warning, dated October 31, 1975, due to your continued failure to qualify on scheme examinations, case checks, your belligerent attitude toward your fellow workers, and your continued tardiness for duty.

As a preference eligible employee, you have the following rights:

You may review the material relied on to support these reasons at Post Office, Lynchburg, Virginia. If you do not understand the reason for this notice, contact the undersigned for further information.

You may answer this notice personally and in writing, or both, to Mr. John D. Ripley, Jr., SCF Manager/Postmaster, Main Post Office any time between March 16th through March 19, 1976, from 8:30 AM to 5:00 PM, and may submit affidavits in support of your answer. You

will be allowed 10 calendar days from date you receive this notice to submit your answer. Full consideration will be given to any answer you submit. As soon as possible after your answer is received, or after expiration of the 10-day limit, if you do not answer you will be given a written decision.

You have the right to file a grievance under the Grievance-Arbitration procedures set forth in Article XV, Section 2 of the National Agreement within 14 days of your receipt of this notice.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, VA 24505

cc:
Personnel File
Personnel Office
A.P.W.U.
Postal Inspector

UNITED STATES POSTAL SERVICE
Postal Inspector
Lynchburg, Virginia 24505

DATE: March 11, 1976
CASE NO. 47-39733-MD

OUR REF: EGB:dce

SUBJECT: Charles V. Bowen, Part-Time Flexible Distribution Clerk, Lynchburg, VA.

TO: Mr. John D. Ripley, Jr.
SC Manager/Postmaster
Lynchburg, Virginia 24505

Herewith is a preliminary Investigative Memorandum and exhibits relating to the conduct of Charles V. Bowen. As you know, I discussed this matter with you on March 11, 1976, and explained there is additional evidence to be presented which is not available for release at this time. During our discussion, you decided that on the basis of the information presently available, immediate action was warranted and this preliminary Investigative Memorandum is furnished in accordance with your request.

As soon as the additional evidence is available for release, I will furnish it to you in a supplemental Investigative Memorandum.

/s/ E. G. Bye
E. G. BYE
Postal Inspector

Enclosure: Investigative Memorandum

UNITED STATES POSTAL SERVICE
Postal Inspector
Lynchburg, Virginia 24505

DATE: March 11, 1976
CASE NO. 47-39733-MD

OUR REF: EGB:dce

SUBJECT: LYNCHBURG, VA: Investigation of the conduct of Charles V. Bowen, Part-Time Flexible Distribution Clerk.

INVESTIGATIVE MEMORANDUM

1. Mr. Charles V. Bowen is a part-time flexible distribution clerk assigned to Tour 3, main office, Lynchburg, Virginia, post office.

2. On February 21, 1976, at approximately 4:00 p.m., Roland B. Morris, Jr., dispatch expediter, was coming up the stairs located next to the elevator on the main workroom floor. As he reached the top of the stairs, PTF Distribution Clerk Charles V. Bowen grabbed Mr. Morris by the shirt collar and shook him. He then took his foot and pushed Mr. Morris down the steps. As a result of the push, Mr. Morris suffered abrasions on the side of his face; his glasses were knocked off and landed halfway down the steps. The frames were bent and one bifocal lens scratched. As he bent over to pick up the glasses, Charles Bowen kicked him.

3. Mr. Roland B. Morris, Jr., was interviewed on February 23, 1976, at his residence. He stated that on February 21, 1976, he reported to work at approximately 2:30 p.m. At about 4:00 p.m. he told the clerks on the outgoing primary cases to put the mail from their cases into the correct carts, that he was tired of imposition placed on him to correct their errors. He further stated that Charles V. Bowen was working the outgoing primary at that time. Mr. Morris said he left the main

workroom floor and went to the basement to pick up SCF mail left over on Tour 2 and as he was coming up the stairs Charles Bowen grabbed his shirt by the collar and shook him, then took his foot and shoved him down the stairs. His face hit the side of the wall, scraping the side of his face. Mr. Morris advised that his glasses were knocked off and one bifocal lens scratched as a result of the push; and, as he bent over to pick up his glasses, Mr. Bowen kicked him from the rear. Mr. Morris signed an affidavit setting forth these details on February 24, 1976. A copy of the affidavit is attached.

4. On February 25, 1976, Charles V. Bowen was interviewed at his residence. Before being questioned he was informed of the nature of the interview and advised of his constitutional rights. Mr. Bowen stated he would like to have an attorney present before being questioned. He was advised to contact my office after obtaining an attorney to set time and place for the interview. On February 27, Mr. Bowen telephoned my office and advised that he had not been able to contact the man he was trying to get in touch with and would contact me later. As of this date, Mr. Bowen has not contacted this office. A memorandum of interview with Mr. Bowen is attached.

5. On February 23, 1976, PTF Distribution Clerk Kathleen A. Paris was interviewed. She stated that on February 21, 1976, at approximately 3:50 p.m., she was working on the outgoing primary case and Charles V. Bowen was working the case beside her. Mrs. Paris said Dispatch Expediter R. B. Morris same over where they were working and said he wanted them to put the mail in the right utility carts. Charles Bowen answered him, but she could not remember what he said. Then R. B. and Charlie started arguing. She stated she told them "to take it easy and calm down." R. B. Morris then walked away. After about five minutes, Charles Bowen got up and left the outgoing primary case. Shortly after

Mr. Bowen left, she said she heard a scuffling noise coming from the area of the time clock, and later saw R. B. Morris with blood on his shirt. She stated she did not see Charles Bowen after he left the outgoing primary case. Mrs. Kathleen Paris signed an affidavit setting forth these details on February 24, 1976. A copy of the affidavit is attached.

6. On February 23, 1976, PTF Distribution Clerk John J. Verdinella was interviewed. He stated that approximately ten months ago, while working the SCF pouch rack located in the basement of the main post office, Charles Bowen walked up to him, grabbed his shirt, and pushed him over the pouch rack. Mr. Verdinella stated that Bowen said, "I would not have said that to anybody," turned him loose, and went back to the SCF letter case. Mr. Verdinella stated he did not say anything to Mr. Bowen and did not know why he grabbed and pushed him. An affidavit was signed by Mr. Verdinella on February 24, 1976, setting forth these details. A copy of the affidavit is attached.

7. On February 23, 1976, PTF Clerk James J. Doss was interviewed. He stated that within the last month he was working the outgoing states case when Charles Bowen walked up to him, grabbed his cigarette out of his mouth, and said, "I am going to beat your ass." Bowen threw the cigarette on the floor and put it out with his foot. Mr. Doss stated that shortly before this incident Bowen used to bum cigarettes from him and that he had stopped giving him cigarettes. Mr. Doss said it was shortly after this when Bowen started to pick on him. On February 24, 1976, Mr. Doss signed an affidavit setting forth these details. A copy of his affidavit is attached.

8. Review of the personnel folder of Charles V. Bowen disclosed the following information:

On April 30, 1971, Melvin S. Raikes, postmaster, Roanoke, Virginia, advised Mr. Bowen by letter that step increase was being withheld.

On September 4, 1974, John L. Ripley, Jr., SCF Manager/Postmaster, Lynchburg, Virginia, issued a letter of proposed suspension for scheme failure.

On September 17, 1974, John D. Ripley, Jr., manager/postmaster, Lynchburg, Virginia, issued a letter of proposed action for failure to qualify on scheme requirements.

On October 22, 1974, Charles V. Bowen was issued a letter of proposed suspension—scheme failure—second attempt failure—leave without pay not requested, by John D. Ripley, Jr., SCF Manager/Postmaster.

On December 27, 1974, Charles V. Bowen was issued a letter of warning—scheme failure, by John D. Ripley, Jr., SCF Manager/Postmaster.

On June 5, 1975, Charles V. Bowen was issued a letter of warning—deficiency, by John D. Ripley, Jr., postmaster.

On September 25, 1975, Charles V. Bowen was instructed to report to the postmaster's office on Friday, September 26, for a conference with management and union officials, by John D. Ripley, Jr., SCF Manager/Postmaster. On October 2, 1975, Charles V. Bowen was issued a letter of proposed suspension—scheme failure, by John D. Ripley, Jr., SCF Manager/Postmaster.

On October 31, 1975, Charles V. Bowen was issued a letter of warning for continued disqualification on scheme examinations, belligerent attitude toward distribution and review clerks in checking his case, continued tardiness, and continued overall disinterest in his work performance, by John D. Ripley, Jr., Manager/Postmaster.

Copies of these personnel actions are attached.

9. Review of PS Form 3990, Case Examination Record, for Charles V. Bowen during the period June 6, 1974, through November 14, 1975, disclosed the following:

On five occasions Charles V. Bowen failed to report for scheme examination.

Charles V. Bowen failed scheme examinations 21 times in 32 attempts.

Copies of case examination records are attached.

/s/ E. G. Bye
E. G. Bye
Postal Inspector

Enclosures:

1. Copy of sworn statement of Roland B. Morris, Jr.
2. Copy of memorandum of interview of Charles V. Bowen
3. Copy of sworn statement of Kathleen A. Paris
4. Copy of sworn statement of John J. Verdinella
5. Copy of sworn statement of James J. Doss
6. Copies of nine personnel actions
7. Copy of PS Form 3990, Case Examination Record

COMMONWEALTH OF VIRGINIA)
) ss
CITY OF LYNCHBURG)

I, Roland B. Morris, Jr., being duly sworn according to law, depose and say:

I am presently employed by the United States Postal Service at Lynchburg, Virginia, as a dispatch expediter. I was appointed to the Postal Service on February 21, 1951, as a PTS clerk at Lynchburg, Virginia. In 1968 I was transferred to the Lynchburg, Virginia, post office. I am 51 years of age and reside at 138 Yorkshire Circle, Lynchburg, Virginia.

On February 21, 1976, I reported to work at the main post office at approximately 2:30 p.m. At about 4:00 p.m. I told clerks on the outgoing primary cases to put the mail from their cases in the correct utility carts, that I was tired of them puting the imposition on me to correct their errors. Charles V. Bowen, PTF clerk, was working the outgoing primary at that time.

I then went to the basement for the SCF mail left over on Tour 2. As I was coming up the stairs beside the elevator, I had approximately two inches of mail in my hand. Charles V. Bowen met me at the top of the stairs. He grabbed my shirt by the collar and shook me. He then took his foot and pushed me down the stairs. My head hit the side of the wall, scraping the side of my face. My glasses were knocked off and landed approximately halfway down the steps. As I bent over to pick them up, Bowen kicked me in the rear. The frames of my glasses were bent and one bifocal lens was scratched. I also have bruises on my throat and chest where he grabbed me. I then saw Bowen take his time card and ring out on the time clock. The next time I saw him was in the bathroom. He had his hands on his head, and was complaining about a headache. I told him the situation could get

serious, so let's shake hands and make up; and go hit the clock and go back to work. He said he wasn't feeling well and wanted to go home.

I have been having some problems with Charles Bowen for some time. For example, I will tell him he has put the wrong label on a package of mail and he will reply, "Go peddle your papers" or "Who cares?"

On Friday, February 20, 1976, while on duty, Charles Bowen came up to me and said, "I don't care how old you are, I am going to ————." I cannot remember exactly what he threatened, but the threat was for some type of bodily harm. I told him that I could do the same thing to him, so "get lost and get back to work."

Subscribed and sworn to before me this —— day of February, 1976, at Lynchburg, Virginia.

E. G. BYE
Postal Inspector

MEMORANDUM OF INTERVIEW

Person interviewed:	Charles V. Bowen, PTF Distribution Clerk, Lynchburg, Virginia, Post Office. DOB 10-04-33. POB Covington, Virginia. Social Security No. 223-38-6770. Address: 4500 Hilltop Drive, Lynchburg, Virginia 24502
Date:	February 25, 1976
Time:	9:05 a.m. to 9:15 a.m.
Subject:	Mr. Bowen's involvement in alleged assault on Dispatch Expediter Roland B. Morris, Jr., on 2-21-76.
Interviewed by:	Postal Inspector E. G. Bye Lynchburg, Virginia
Others present:	None

Mr. Charles V. Bowen was advised of the nature of the interview—his involvement in the assault of Dispatch Expediter Roland B. Morris, Jr., on February 21, 1976, at the main post office workroom.

He was advised that assault on a postal employee was a criminal violation; therefore, I was required to advise him of his constitutional rights against self-incrimination. He was advised that before "you are asked any questions, you must understand your rights. You have a right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

Mr. Bowen stated he would like to have an attorney present before any questions were asked.

He was advised to contact the postal inspector's office after obtaining an attorney to make an appointment for the interview.

Mr. Bowen stated he would call my office Friday, February 27, 1976.

E. G. BYE

March 11, 1976

COMMONWEALTH OF VIRGINIA)
) SS
CITY OF LYNCHBURG)

I, Kathleen A. Paris, being duly sworn according to law, depose and say:

I am presently employed by the United States Postal Service as a part-time flexible distribution clerk, having been appointed to this position on April 8, 1974.

On Saturday, February 21, 1976, at approximately 3:50 p.m., I was working an outgoing primary case. Charles Bowen was working on the case beside me. He appeared to be in a bad mood and complained that his knee was bothering him. About that time R. B. Morris, dispatch expediter, came over to where we were working and said that he wanted us to put the mail in the right utility carts. Charles Bowen answered back, but I cannot remember what he said; and then R. B. and Charlie started arguing. I cannot remember exactly what they were saying, but both implied that they would like to settle their argument outside. I told them both "to take it easy and calm down." R. B. Morris then walked away. After approximately five or ten minutes, Charlie got up from his case and left. Just after that I heard a scuffling noise coming from the area of the time clock. I later saw R. B. Morris and he had blood on his shirt. I do not remember seeing Charles Bowen after he left the outgoing primary case.

Subscribed and sworn to before me this —— day of February, 1976, at Lynchburg, Virginia.

Postal Inspector

COMMONWEALTH OF VIRGINIA)
) ss
CITY OF LYNCHBURG)

I, John J. Verdinella, being duly sworn according to law, depose and say:

I am presently employed by the United States Postal Service, Lynchburg, Virginia, as a part-time flexible distribution clerk, having been appointed to that position on March 7, 1974. I am 29 years of age and reside at 714 Kenbridge Road, Lynchburg, Virginia.

Approximately ten months ago I was working the SCF pouch rack located in the basement of the main post office. Charles V. Bowen walked up to me, grabbed me by the shirt, and pushed me back over the pouch racks. He said, "I would not have said that to anybody"; then turned me loose and went back to working mail on the SCF letter case. I did not say anything to him.

I do not know what made Charles Bowen grab and push me. Approximately two hours before this incident, several of us, including Bowen, were in the swing room talking during a break. I do not remember anything that was said at that time that would have caused him to grab me and I had not talked to him since that time. I was not injured and I did not think any more about it. After hearing about the incident between Bowen and Morris on February 21, 1976, I realized that this possibly also was an assault. I have had no further trouble with Charles Bowen since that time.

Subscribed and sworn to before me this 24th day of February, 1976, at Lynchburg, Virginia.

/s/ E. G. Bye
E. G. BYE
Postal Inspector

COMMONWEALTH OF VIRGINIA)
) ss
CITY OF LYNCHBURG)

I, James J. Doss, being duly sworn according to law, depose and say:

I am presently employed by the United States Postal Service, Lynchburg, Virginia, as a part-time flexible clerk, having been appointed to this position on December 9, 1974.

Within the last month I was working the outgoing states case when Charles Bowen walked up to me, grabbed my cigarette out of my mouth, and said, "I am going to beat your ass." He threw the cigarette on the floor and put it out with his foot. Just after that, the supervisor moved him to another case. Bowen used to bum cigarettes from me all the time and shortly before this incident I quit giving him cigarettes. He had started picking on me at that time. I did not say anything or do anything that I know of that would cause him to take the cigarette out of my mouth and threaten him. At the time of this incident, I did not consider it a threat since I had heard him say the same thing to other employees. Charles Bowen was very unpredictable. Some days he would come in in a good mood and get along fine and other days he would come in and start picking on everybody.

Subscribed and sworn to before me this —— day of February, 1976, at Lynchburg, Virginia.

Postal Inspector

UNITED STATES POST OFFICE

DATE: September 4, 1974
P.O.C.L.
First

OUR REF: JDR:RWP:EGH:plb

SUBJECT: Proposed Suspension—Scheme Failure
SPECIAL DELIVERY—CERTIFIED MAIL
Return Receipt Requested

TO: Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, Virginia 24502

On August 29, 1974, you were scheduled for your second attempt to qualify on City C-2 examination. Since you have failed to report as scheduled and have not requested an extension of the due date, it is proposed that you be suspended from duty. This suspension is to be effective September 6, 1974, and will end upon you successfully passing the examination or September 13, 1974, whichever is earlier.

It is imperative that you make every effort possible to study diligently and pass this examination on your next attempt. Failure to do so will result with ultimate discharge from the Postal Service possible.

/s/ R. W. Patterson
for JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, Virginia 24505

cc: Personnel File
Personnel Officer
Scheme Examiner

John D. Ripley, Jr.: jde September 17, 1974

Proposed Adverse Action
Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, Virginia 24502

This is advance notice of proposed adverse action. It is proposed to remove you from the Postal Service. The proposed action is considered to be for such as will promote the efficiency of the service and will be effected no sooner than thirty (30) calendar days from the issuance of this letter.

The charges against you and the information supporting the charges are: You have failed to qualify on your assigned scheme requirements. The following data is from your POD Form 3990 Case Examination Record.

Your initial scheme assignment was City C-3, due on 6/6/74 for which you failed to report, therefore was recorded a failure. You were counselled by Mr. P. B. Sanderson, Director, Customer Services and rescheduled for 6/21/74. On 6/14/74 you made a second attempt to case the examination and passed with a score of 98.

Your next assignment was City C-1, due on 7/8/74 which you failed with a score of 35. This time you were counselled by Mr. J. D. Calhoun, Personnel Assistant and rescheduled for 7/23/74. On 7/23/74 you attempted to case the examination, but failed with a score of 91. Again you were rescheduled for 8/7/74. On 7/24/74 you attempted the examination for the third time and passed with a score of 98.

You were then assigned City C-2, due on 8/8/74 and failed to report as scheduled, therefore recorded a failure, counselled by Mr. R. W. Patterson, Director, Mail Processing and rescheduled for 8/29/74. Again you failed to report as scheduled and was recorded with a

failure and given a letter of proposed suspension as you did not request Leave Without Pay. On 9/13/74 you requested extension fo you due date of 8/29/74 due to being hospitalized at that time and was granted the extension from 8/29/74 to 9/16/74. On 9.16/74 you attempted the examination and failed with a score of 62.

The above procedures are in accordance with the Methods Handbook entitled "Schemes, Assignments and Examinations". Since this is the third attempt and failure on this particular examination and you have been repeatedly counselled on the importance of maintaining a good scheme record, which has been completely unsatisfactory up to this time, you will not be rescheduled for further examinations on City C-2, but if within the thirty (30) days you voluntarily attempt to qualify and achieve a score of 95%, all charges will be dropped. You have the right to request Leave Without Pay in order to prepare for the examination. Unless you request Leave Without Pay you will continue in your present duty status pending a decision on above charges.

You have the right to answer the charges in person or in writing or both, and to be accompanied by a representative of your choosing. Your reply is to be made within ten (10) days of receipt of this letter. You may also submit statements or affidavits in support of your answer. Any written reply should be directed to the Postmaster.

If you reply in person to Postmaster, John D. Ripley, Jr. or Director of Mail Processing, Mr. R. W. Patterson, one or the other will be available to you between the hours of 8:30 a.m. and 5:00 p.m. Monday through Friday.

After expiration of the ten day time limit for reply, all facts in your case including any replies you may submit

will be given full consideration before a decision is rendered. A decision in writing will be issued to you.

Very truly yours,

/s/ [Illegible]
JOHN D. RIPLEY, JR.
Manager/Postmaster
Lynchburg, Virginia 24505

cc: Personnel Folder

Certified Mail
Deliver to Addressee Only
Return Receipt Requested.

UNITED STATES POST OFFICE
Lynchburg, VA 24505

DATE: October 22, 1974

P.O.C.L.
First.

OUR REF: JDR:RWP:egh

SUBJECT: Proposed Suspension—Scheme Failure
Second attempt failure—
Leave Without Pay Not Requested
SPECIAL DELIVERY—CERTIFIED MAIL
—ADDRESSEE ONLY—
RETURN RECEIPT REQUESTED

TO: Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, Va. 24502

On September 27, 1974, you were scheduled for City A scheme examination and upon your failure to report, you were counseled and rescheduled for October 18, 1974. On this date you attempted the examination, attaining a grade of 77% and your record has been charged with a second scheme failure on this exam.

In view of your second attempt failure on this examination, and in accordance with scheme regulations, you are being rescheduled for City A. on November 2, 1974 and it is proposed that you be suspended from duty. This suspension is to be effective October 25, 1974 and will end upon you successfully passing the examination or November 2, 1974, whichever is earlier.

You are reminded that the rescheduling of this examination is not to delay the due date of your next regularly scheduled examination, Va. Sec. 2, which is November 12, 1974.

Since June 6, 1974, your record indicates four failures to report, as scheduled, for scheme examinations, seven

scheme failures, seven reschedulings of examinations, four counselings, two letters of proposed suspension, one 30 day notice and one special extension.

In view of the above, this indicates the urgent and serious need for much more attention and application on your part if you desire to be retained in the Postal Service. Therefore, it is most imperative that you make every possible effort to study seriously and diligently to pass this examination at the earliest possible time. Also, you should make every possible effort to pass all examinations in advance of due dates.

You have the right to file a grievance under the Grievance-Arbitration procedure set forth in Article XV, Section 2 of the National Agreement within 14 days of your receipt of this notice.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, Va. 24505

cc: Personnel File
Personnel Office
SCF Director/Mail Processing
Foreman of Mails
Scheme Examiner

UNITED STATES POST OFFICE
Lynchburg, Va. 24505

DATE: December 27, 1974
P.O.C.L.
First

OUR REF: JDR:RWP:egh

SUBJECT: Scheme Failure—Letter of Warning

TO: Mr. Charles V. Bowen
4500 Hilltop Dr.
Lynchburg, Va. 24502

This is a letter of warning concerning your failure to attain a passing grade on Va. Sec. 2, scheme examination which was due on November 12, 1974.

Since you failed to report as scheduled you were rescheduled for December 3, and counseled. On December 3, you attained a grade of only 62% and this was recorded as your second failure on this exam.

Following this, you were granted a special extension, during the Christmas mailing period, until December 26. On December 26, you attempted to qualify but failed to do so with a grade of only 78%.

A review of your Case Examination Record, Form 3990, indicates numerous failures to report, counselings, failing grades, reschedulings, and other actions.

It sems apparent that there is a great need for you to devote much more time, effort and serious attention to this most essential requirement.

In accordance with your request, on Form 3971, you are being granted Leave Without Pay until January 16, 1975 or until you successfully pass this scheme examination, whichever is earlier.

Also, you are reminded that you will be due on your next regularly scheduled scheme examination, Va. Sec. 1, on January 30, 1975.

/s/ R. W. Patterson
for John D. Ripley, Jr.
SCF Manager/Postmaster
Lynchburg, Va. 24505

cc: Personnel File
Personnel Office
SCF Director/Mail Processing
Scheme Examiner

Certified Mail—Return Receipt Requested
Restricted Delivery

June 5, 1975

JDR:RWP:jdc
Letter of Warning
Deficiency

Mr. Charles V. Bowen, SSN 223-38-6470
4500 Hilltop Drive
Lynchburg, Virginia 24502

The reason for this Warning letter is self-explanatory. It is directed to you for the express purpose of warning you there is a serious deficiency in your employment record. It must be corrected immediately.

The following list the most resent deficiencies:

Saturday, May 31, 1975, you were scheduled to report for duty at 0500 hour and did not report until 1330 hour at which time you stated that Mr. C. D. Padgett had changed your schedule. Mr. Padgett's statement on file refutes this.

Monday, June 2, 1975, you call in requesting annual leave, which was denied and you were instructed to report for duty as scheduled. This you failed to do, therefore was charged with A.W.O.L.

Tuesday, June 3, 1975, you called in that you were having automobile trouble in Roanoke, Virginia, therefore was releaved from duty and was advised to report to Mr. John D. Ripley, Jr. Postmaster and Mr. R. W. Patterson, Director, Mail Processing.

Thursday, June 5, 1975, you were cancelled by Mr. John D. Ripley, Jr., Postmaster and Mr. R. W. Patterson, Director, Mail Processing on above subject.

Also there is a very serious deficiency in your scheme examinations record which must be corrected immediately.

If you are having any problem that we can be of assistance in helping you to overcome, please consult us promptly.

It is sincerely hoped that this warning letter will be sufficient and that you will overcome your deficiency immediately. However your deficiencies continue, recommendation will be made to release you from the U. S. Postal Service.

Although it is not a requirement, you may reply to this letter within the next five days. Your reply, if any, as well as this letter will be placed in your personnel folder. In addition, you may request the Postmaster to review this action within thirty (30) working days from issuance date of this letter.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
Postmaster
Lynchburg, Virginia 24505

Certified Mail—Return Receipt Requested
Restricted Delivery—Special Delivery

September 25, 1975

JDR/jdc
Conference

Mr. C. V. Bowen
4500 Hilltop Drive
Lynchburg, Virginia 24502

Your are hereby instructed to report to the Postmaster's office, Friday September 26, 1975 at 3:00 P.M. for a conference with management and union officials.

This meeting is mandatory and you are expected to comply with same.

You will be on the clock for this meeting.

/s/ R. W. Patterson
for John D. Ripley, Jr.
SCF Manager/Postmaster
Lynchburg, Virginia 24505

cc; Personnel Folder

UNITED STATES POST OFFICE
Lynchburg, VA 24505

DATE: October 2, 1975

P.O.C.L.
First

OUR REF: JDR:RWP:egh

SUBJECT: PROPOSED SUSPENSION—
SCHEME FAILURE
SPECIAL DELIVERY—CERTIFIED MAIL
#710004—Addressee only—
Return Receipt Requested

TO: Mr. C. V. Bowen
4500 Hilltop Drive
Lynchburg, Va. 24502

On September 30, 1975, you failed on your second attempt to qualify on City C-3 section scheme examination when you attained a grade of 82%.

Since you failed to request Leave Without Pay, as provided in scheme regulations, it is proposed that you be suspended from duty. This suspension is to be effective October 4, 1975 and will end upon you successfully passing the examination or October 15, 1975, whichever is earlier.

You have the right to file a grievance under the Grievance-Arbitration procedure set forth in Article XV, Section 2 of the National Agreement within 14 days of your receipt of this notice.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, Va. 24505

cc: Personnel File
Personnel Office
Director/Mail Processing
Foreman of Mails
Schemes Examiner

UNITED STATES POST OFFICE

DATE: October 31, 1975

P.O.C.L.

OUR REF: JDR:RWP:jdc

SUBJECT: Letter of Warning

TO: Mr. C. V. Bowen
4500 Hilltop Drive
Lynchburg, Virginia 24502

In accordance with Article XVI of the 1975 National Agreement, it is necessary to give you this warning letter relative to the continued deficiencies in your work performance since your last counseling of September 26, 1975 as outlined below.

1. Continued disqualification on your scheme examinations and case checks. Also the belligerant attitude shown toward the Distribution and Review Clerks when they are checking your case.
2. Your continued tardiness. One hour and thirty minutes on October 27, 1975.
3. Your continued overall disinterest in your work performance.

This letter of warning is given to afford you a *last* opportunity to immediately correct your deficiencies prior to removing you from the Postal Service. This is a serious matter and recurrance cannot be tolerated. You are expected to make every effort to avoid this happening.

You have the right to appeal the issuance of this letter of warning under the Grievance-Arbitration Procedure as set forth in Article XV of the 1975 National Agree-

ment, within fourteen (14) days of your receipt of this letter.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, Virginia 24505

Certified Letter
Return Receipt Requested
Restricted Delivery

September 16, 1974.

First

JDR:egh

Extension on due date of scheme examination

Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, Va. 24502

In response to your telephone call of Friday, September 13 and your letter of same date requesting an extension of the due date for your City C-2 examination you are being granted an extension from September 13 to September 16. This is in accord with our telephone conversation.

It is expected that you will comply with this change in schedule and pass this and all future examinations on or before the scheduled dates.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, Va. 24505

Copy: Personnel Officer
Personnel File
Scheme Examiner

UNITED STATES POST OFFICE
Lynchburg, VA 24505

DATE: November 25, 1974

P.O.C.L.
First

OUR REF: JDR:RWP:egh

SUBJECT: Scheme Failure—

Request to report to Director/Mail Processing SPECIAL DELIVERY, CERTIFIED MAIL, ADDRESSEE ONLY, RETURN RECEIPT REQUESTED

TO: Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, Va. 24502

On November 13, 1974 you were sent Examination Statement, Form 3989, (copy attached) reporting failure to report for Va. Sec. 2 scheme examination which was due on November 12 and rescheduling you for a second attempt on or before December 3, 1974.

In the "remarks" section of this Form 3989 you were requested to report to Mr. R. W. Patterson, Director of Mail Processing at your next possible opportunity. Since we have no record of you seeing Mr. Patterson since November 13, you are requested, again, to report as directed when you next report to work.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, Va. 24505

cc: Personnel File
Personnel Office
SCF Director/Mail Processing
Scheme Examiner

UNITED STATES POST OFFICE
Lynchburg, VA 24505

DATE: December 4, 1974

P.O.C.L.
First

OUR REF: JDR:RWP:egh

SUBJECT: Scheme Failure—Second attempt—
Christmas mailing period
SPECIAL DELIVERY, CERTIFIED MAIL, ADDRESSEE ONLY, RETURN RECEIPT REQUESTED

TO: Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, Va. 24502

Your examination on Virginia Sec. 2 scheme was originally due November 12, 1974. However, since you failed to report by that date your record was charged with a failure and you were counseled and rescheduled for December 3.

On December 3 you attempted this exam and attained a grade of only 62%. Your record has been charged with another scheme failure on Va. Sec. 2 on this, your second, attempt.

Following second attempt scheme failure, scheme regulations require rescheduling, a letter of warning and LWOP or suspension.

In accordance with our understanding with you on December 3 we are postponing application of this requirement until December 26 because of the heavy Christmas mailing period.

You will be expected to make every possible effort, however, to pass this examination during this period. If the examination has not been successfully passed by Decem-

ber 26, we will again apply scheme regulations which require rescheduling and LWOP or suspension.

You are reminded that Va. Sec. 1 is scheduled for January 30, 1975 and this will not delay or postpone this requirement.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, Va. 24505

cc: Personnel File
Personnel Office
SCF Director/Mail Processing
Scheme Examiner

4500 Hilltop Drive
Lynchburg, Virginia 24502

Mr. John D. Ripley, Jr.
Postmaster
Main Post Office
Lynchburg, Virginia 24505

Dear Mr. Ripley:

Responding to your letter of June 5, 1975, the first four paragraphs referred specifically to the dates of Saturday, May 31, 1975, Monday, June 2, 1975, Tuesday, June 3, 1975, and Thursday, June 5, 1975.

In the first paragraph of the letter pertaining to Saturday, May 31, 1975, it states, "Saturday, May 31, 1975, you were scheduled to report for duty at 0500 hour and did not report until 1330 hour at which time you stated that Mr. C. D. Padgett had changed your schedule." I think the record should show that I tried to make it very clear while the supervisor had shown me on annual leave the previous week, Mr. Padgett told me only that my first work day would be Saturday, May 31, 1975.

Concentrating on the second paragraph of your letter pertaining to Monday, June 2, 1975, in which I am shown with A.W.O.L. It should be known that I made every conceivable effort to solicit help in getting off this day. I made three long distance calls in order to get this permission and certainly due to circumstances beyond my control it was an impossibility for me to get to work.

Concerning Tuesday, June 3, 1975: I called to the office of Mr. Patterson stating that I had automobile trouble and it being in the garage quite a distance from Lynchburg, would like to have Tuesday off to get the work started on my car. The statements that I made in your office on June 5, 1975, when I returned to work were factual and can be substantiated.

I will endeavor to do my upmost in correcting the deficiency which you refer to in the letter of June 5, 1975, and would ask assistance in getting more time to work the city primary and secondary.

I wish to thank you for the time and interest in reviewing this correspondence.

Sincerely yours,

CHARLES BOWEN

UNITED STATES POST OFFICE

DATE: March 2, 1976
P.O.L.C.

OUR REF: JDR:TOM:plb

SUBJECT: Re-qualifying on City Scheme (Primary A)

TO: Mr. Charles V. Bowen
4500 Hilltop Drive
Lynchburg, VA 24502

You were given a thirty (30) day notice on February 3, 1976, to re-qualify on the Primary A Scheme.

Due to the time allowed for re-qualifying, your request for a 10-day extension is denied.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, VA 24505

cc:
Scheme Examiner
Personnel File
Personnel Office

March 2, 1976

JDR:TOM:plb

Re-qualifying on City Scheme (Primary A)

Mr. Charles V. Bowen
4500 Hilltop Drive.
Lynchburg, VA 24502

You were given a thirty (30) day notice on February 3, 1976, to re-qualify on the Primary A Scheme.

Due to the time allowed for re-qualifying, your request for a 10-day extension is denied.

/s/ John D. Ripley, Jr.
JOHN D. RIPLEY, JR.
SCF Manager/Postmaster
Lynchburg, VA 24505

132

2-29-76

Dear Sir:

I have been assigned a scheme examination on City Primary A scheduled for March 3, 1976. I would like to request a ten-day extension because of sickness.

Sincerely,

CHARLES V. BOWEN
Distribution Clerk

TELEGRAM (August 17, 1976)

USPS REG: E3-VA-211-D
APWU #: 8705 DJ
DISCIPLINE: DISCHARGE
NAME: CHARLES BOWEN
LOCATION: LYNCHBURG, VA

DEAR BROTHER CARR:

THE ARBITRATION BOARD OF THE AMERICAN POSTAL WORKERS UNION HAS REVIEWED AND GIVEN SERIOUS CONSIDERATION TO THE REQUEST FOR ARBITRATION IN THE ABOVE CITED CASE.

BASED ON THE INFORMATION CONTAINED IN THE FILE AND RELYING ON PREVIOUS NEGATIVE ARBITRATION AND/OR OTHER DECISIONS ON THE SAME ISSUE, IT IS THE DECISION OF THE ARBITRATION BOARD NOT TO REQUEST ARBITRATION AS PER THE FOLLOWING:

BASED ON THE EMPLOYEE'S PAST RECORD.

IF YOUR LOCAL WISHES TO ARBITRATE THIS CASE AT YOUR COST PLEASE ADVISE THE DIRECTOR OF INDUSTRIAL RELATIONS APWU WITHIN 72 HOURS FROM THE DATE OF RECEIPT OF THIS LETTER, SO THAT WE CAN COMPLY WITH THE TIME LIMITS OF THE CONTRACT.

SINCERELY AND FRATERNALLY,

DON JOHNSO;
ADMIN. VICE PRESIDENT, CLERK CRAFT
FOR: FRANCIS S. FILBEY
GENERAL PRESIDENT

Opposition

1

No. 81-525

Office-Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES V. BOWEN, PETITIONER

v.

UNITED STATES POSTAL SERVICE and
AMERICAN POSTAL WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-525

CHARLES V. BOWEN, PETITIONER

v.

UNITED STATES POSTAL SERVICE and
AMERICAN POSTAL WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner contends that this case warrants review by this Court because the court of appeals did not hold the respondent union liable for any portion of petitioner's lost earnings following his unlawful discharge. In addition, as a separate ground for review, petitioner complains that the court of appeals did not alter the district court judgment to hold the respondent employer liable for the full amount of petitioner's lost earnings rather than for only the portion found attributable to the employer's actions.

1. In 1976 petitioner Charles V. Bowen was an employee of respondent United States Postal Service and was represented for the purpose of collective bargaining by respondent American Postal Workers

Union, AFL-CIO (APWU) (Pet. App. A14). In February 1976 petitioner was suspended by the Postal Service because of an incident involving a scuffle with another employee. On March 30, 1976, following an investigation into the incident, petitioner was discharged from his Postal Service employment (Pet. 3-4; Pet. App. A14). Petitioner then filed a grievance with the APWU local, which eventually referred the matter to the national office (Pet. 4). The national APWU office declined to refer petitioner's grievance to arbitration (Pet. 5). Accordingly, in December 1976, petitioner commenced this suit in the United States District Court for the Western District of Virginia, alleging that APWU breached its duty of fair representation and that the Postal Service discharged him without just cause (Pet. A2-A4).

The case was tried before a jury, which served in an advisory capacity as to matters involving the Postal Service (Pet. App. 4). The Postal Service contested the allegation that petitioner's discharge was wrongful, and APWU argued that it had not breached its duty to represent petitioner fairly. Nevertheless, the jury found against both defendants and rendered a special verdict apportioning the amount of damages between them according to the fault of each (*id.* at A21-A22). The district court accepted the jury's findings, including those against the Postal Service offered in an advisory capacity (*id.* at A4, A15, A17, A18). On the basis of these findings, the court awarded compensatory damages to petitioner in the amount of $52,954.12—"defendant USPS to pay $22,954.12; defendant APWU to pay $30,000" (*id.* at A12). In addition, the court awarded costs against respondents "jointly and severally" in the amount of $1,463, and attorneys' fees

in the amount of $20,000—$15,000 to be paid by the Postal Service and $5,000 to be paid by APWU (*id.* at A13).

Both APWU and the Postal Service appealed from this judgment. The court of appeals affirmed the district court's ruling in all but one respect, modifying the judgment below to hold that no portion of petitioner's lost earnings of $52,954.12 should be charged to APWU (Pet. App. A5). Both APWU and the Postal Service then timely filed petitions for rehearing and suggestions for rehearing en banc, which the court of appeals denied by order of May 29, 1981 (*id.* at A25). Subsequently, on July 7, 1981, the court of appeals panel sua sponte clarified the meaning and effect of its judgment on appeal by adding a new footnote to its original opinion (*id.* at A27-A28). Specifically, following the statement in the text that no portion of petitioner's lost earnings was chargeable to the union, the court of appeals added the following clarification in footnote 6 (Pet. App. A5):

> We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection we note that no appeal was entered by the plaintiff from the judgment against the Service in the amount of $22,954.12.

Thus, with respect to the original amount of $52,954.12 in compensatory damages for petitioner's lost earnings, the Postal Service is liable for only the $22,954.12 awarded against it in the district court's judgment, and APWU is not liable for the additional $30,000 in damages originally assessed against it (see Pet. App. A12).

Petitioner then sought rehearing and rehearing en banc in the court of appeals, arguing that the entire

amount of $52,954.12 should be assessed against the Postal Service or, in the alternative, that the original apportionment of damages between APWU and the Postal Service should be reinstated. The court of appeals denied this petition for rehearing on September 15, 1981.

2. Petitioner contends that the court of appeals' reversal of the award against APWU warrants further review because it contradicts principles announced by this Court in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and its progeny (Pet. 9-15), because it conflicts with a decision of another court of appeals and with decisions of other panels in the same circuit (Pet. 16-17), and because it frustrates national labor policy (Pet. 17-18). Although we agree with petitioner that the court of appeals' ruling is in error, we do not agree that the ruling is of sufficient importance to require the attention of this Court.

Petitioner's argument is premised on the notion that the court of appeals has in this case articulated a broad principle that a union may never be held liable for any portion of an employee's lost wages, regardless of the union's degree of fault in causing or aggravating the injured employee's losses. On the contrary, the somewhat cryptic opinion can be fairly read as ruling only that, under the particular facts of this case, petitioner's recovery of compensatory damages for lost earnings should come solely from his employer and not from the union. Indeed, accompanying the court of appeals' holding to this effect is a citation (Pet. App. A5) to that portion of the Court's opinion in *Vaca* v. *Sipes*, *supra*, stating that certain compensatory and punitive damages were "not recoverable from the Union in the circumstances of [the] case" and that "[t]he appropriate remedy for a breach of a union's duty of fair

representation must vary with the circumstances of the particular breach." 386 U.S. at 195.

The narrow scope of the court of appeals' holding in this case is further confirmed by the fact that the Fourth Circuit has, in other decisions, recognized the principle that an employee's compensatory damages may, in a proper case, be charged against the union and not just the employer. See *Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F.2d 888, 892-893 (4th Cir. 1980); *Self* v. *Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439, 444 (4th Cir. 1980); *Harrison* v. *United Transportation Union*, 530 F.2d 558, 562-563 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 492 (4th Cir. 1966), cert. denied, 386 U.S. 960 (1967). It is unlikely that the panel in this case intended, without discussion, to repudiate this line of cases within its own circuit. The Fourth Circuit's denial of rehearing en banc, without a dissent, supports this conclusion. Because the panel's holding appears to be confined to the circumstances of this case, the precedential effect of the decision should be limited.

3. Petitioner also urges (Pet. 18-23) that, even if this Court declines to review the question of the union's liability for compensatory damages, the Court should nevertheless summarily reverse the holding that the Postal Service is liable to petitioner only for the amount of compensatory damages found attributable to its actions ($22,954.12) rather than for the full amount of damages ($52,954.12). In this instance, as well, the court of appeals established no broad principle deserving review by this Court. In any event, the court of appeals acted reasonably in refusing to enlarge the amount of the compensatory

damages award for which the district court, relying on the advisory jury, found the Postal Service liable.

Contrary to petitioner's suggestion (Pet. 21), the court of appeals did not announce a startling new rule generally requiring a party who is entirely successful in the district court to file a cross-appeal whenever the losing party takes an appeal. To begin with, petitioner was not entirely successful in the district court. That court did not provide for the compensatory damages liability to be joint and several, as it did in the case of the award of costs (Pet. App. A12, A13). Instead, the court specified separate awards against the Postal Service and the APWU. Petitioner did not seek or obtain any alteration of that language in the judgment, and the Postal Service and the APWU each filed its appeal from the award made against it. The court of appeals' determination that the judgment against the APWU should be reversed did not oblige that court to alter the wholly separate award and to "reapportion liability" (Pet. 19) against the Postal Service. In the addition of footnote 6 to its opinion, the court of appeals simply made it clear that its ruling that the union should not be held liable for any of petitioner's lost wages did not constitute a reversal of the limit placed on the award against the Postal Service by the district court. Moreover, the court of appeals' reference, without elaboration, to petitioner's failure to file a cross appeal does not suggest that the court believed it was without power to increase the award against the Postal Service in the absence of an appeal by petitioner, if that relief had been deemed appropriate. Cf. 28 U.S.C. 2106.[1]

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[1] Had the Postal Service failed to take an appeal and simply paid petitioner the $22,954.12 in compensatory damages for which it was liable under the judgment, and had the APWU

In sum, the court of appeals' opinion, as clarified by footnote 6, simply respects the conclusion of the finders of fact that the sum of $22,954.12 represents the total amount of lost wages attributable to the fault of the Postal Service.[2] Whatever other errors the court of appeals may have made in its decision, the court's refusal to enlarge this award against the Postal Service was not unreasonable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1981

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appealed and secured a reversal of the $30,000 judgment against it, a refusal by the court of appeals to enlarge the judgment against the Postal Service so as to guarantee petitioner full payment of compensatory damages would hardly constitute an error deserving of Supreme Court review. The only difference here is that the Postal Service appealed from the award made against it. That difference would not appear to make the case appropriate for review by this Court.

[2] The advisory jury found (Pet. App. A22) that the fault of the Postal Service accounted for only $17,000 of petitioner's lost earnings. The district court added to that sum damages in the amount of $5,954.12, representing petitioner's loss of earnings during the trial (*id.* at A18).

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Opposition

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No. 81-525

IN THE

Supreme Court of the United States

October Term, 1961

CHARLES V. BOWEN

Petitioner

vs.

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The
Fourth Circuit

BRIEF FOR RESPONDENT, AMERICAN POSTAL WORKERS UNION, AFL-CIO IN OPPOSITION

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October, 1961

QUESTION PRESENTED FOR REVIEW

Whether an employee whose discharge was caused by his employer's breach of contract and whose lost wages flowed directly from that breach can recover part of such lost wages from his union which breached its duty of fair representation only by failing to pursue his grievance to arbitration, when both the employer and union were before the court.

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BRIEF FOR RESPONDENT, AMERICAN POSTAL WORKERS UNION, AFL-CIO IN OPPOSITION

OPINIONS BELOW

Findings Of Fact and Conclusions Of Law by the United States District Court for the Western District of Virginia, dated May 11, 1979, are unofficially reported at 103 LRRM 2367. The Opinion of the United States Court of Appeals for the Fourth Circuit as revised July 7, 1981 is reported at 642 F.2d 79 (1981).

JURISDICTION

The jurisdictional requisites are adequately presented in the Petition. Petitioner's petition for rehearing and suggestion for rehearing en banc in the Fourth Circuit were denied on September 15, 1981.

STATUTES INVOLVED

The case proceeded in the District Court and in the Fourth Circuit as if the statutes involved were Sec. 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a) and Sec. 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a). No party contested these alleged jurisdictional bases. However, since the case involved the United States Postal Service, jurisdiction properly should have been founded on the analogous provisions of the Postal Reorganization Act, 39 U.S.C. § 1203(a) and 39 U.S.C. § 1208(b).[1]

STATEMENT

(a) *Nature of the Case*

Petitioner, Charles V. Bowen, a discharged former employee of the United States Postal Service ("USPS" or "Postal Service"), sued his union, American Postal Workers Union, AFL-CIO, ("APWU" or "Union") for breaching its duty of fair representation in handling the grievance relating to his discharge and the Postal Service for breach of contract for discharging him without just cause under the applicable collective bargaining agreement. With regard to APWU his complaint was that, although it had taken his grievance part of the way through the grievance procedure, it had improperly declined to pursue his case to arbitration.

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[1] "§ 1203. Recognition of labor organizations

(a) The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative. . . ."

"§ 1208. Suits . . .

(b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy."

(b) *Proceedings in the District Court*

Trial was conducted December 19-20, 1978 before a jury as to the defendant APWU, with the jury acting as an advisory jury as to defendant Postal Service. The jury was instructed to return a Special Verdict. (The Special Verdict is annexed to the Petition for Certiorari as Appendix D).

Question No. 3 of the Special Verdict informs the jurors if they find either the Union or the Postal Service or both to be liable, then the jurors are to state the total compensatory damages to which plaintiff is entitled. In connection with this question, the Court instructed the jurors they could consider any of the following which they believe "to have been caused by the discharge of the plaintiff by the Postal Service: any loss of earnings from the time of his termination, back in February, 1976 up to the present time; any mental anguish humiliation or embarassment sustained by him. . . ." (App. 507-508).

The jury found APWU liable for breach of the duty of fair representation and the Postal Service liable for discharging Bowen without just cause. The jury answered Question No. 3 by assessing total compensatory damages of $47,000. This is virtually the same figure as the $45,389.87 in wages the parties stipulated at trial would have been earned by plaintiff (App. 318).

In question No. 8 the Court asked the jury to break down any compensatory damages as between the Union and the Postal Service. In doing so, the Court stated, the jury should consider the length of time between the discharge and the time of any final arbitration and this amount could be assessed against the Postal Service because, "even if the Union had asked for arbitration it would take a certain period of time for the arbitration to be heard" (App. 511-512).

Then, said the Court, the jury might consider any lost earnings after the imaginary arbitration date to be the

responsibility of the Union for not representing plaintiff fairly (App. 512-513).

Based on this instruction the jury divided the $47,000 into $30,000 against the Union and $17,000 against the Postal Service.[2]

In post-trial motions the Union contended that only the Postal Service, as the employer, could be assessed for back wages. The Postal Service, in turn, moved for involuntary dismissal as to it despite the jury's advisory verdict. Plaintiff moved for judgment on the jury verdict, for a direction to the Postal Service to rehire plaintiff and for attorneys fees and costs.

On May 11, 1979, the Court decided these post-trial motions and entered its Findings of Fact and Conclusions of Law (Appendix C to the Petition for Certiorari) and Judgment Order (Appendix B to Petition for Certiorari). The Court found that the Postal Service's discharge of Bowen was not for just cause. The Court also found that Bowen's grievance was "apparently meritorious" and that APWU's handling of the grievance was arbitrary and perfunctory.

Tracking his instructions to the jury, the Court found as a fact that if plaintiff's grievance had been arbitrated the imaginary date of an arbitration award would have been August, 1977 and that that award would have rein-

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[2] The jury also awarded punitive damages against both APWU and the Postal Service. (Answers to Questions 4-7, Special Verdict). The Court subsequently declined to award punitive damages against the Postal Service on the basis of sovereign immunity and set aside the jury's award of punitive damages against APWU on the ground that its actions were "less reprehensible" than those of USPS. (Findings of Fact and Conclusions of Law, Appendix C to Petition for Certiorari, p. A 18). The Court's action ante-dated this Court's holding in *International Brotherhood of Electrical Workers* v. *Foust* 442 U.S. 42 (1979) that punitive damages are not available against a union in a duty of fair representation case.

stated Bowen. (Finding of Fact No. 9. p. A 15). The Court concluded, as did the jury, that plaintiff lost wages between the date of discharge and the date of trial in the sum of $47,000 which the Court also apportioned $30,000 to the Union and $17,000 to the Postal Service on the theory that the Postal Service was liable for wages between the date of discharge and the date of the imaginary arbitration award while the Union was liable for wages between the date of the hypothetical arbitration award and the date of trial. The Court also assessed an additional $5,954.12 in back wages against the Postal Service for the period between trial and the date of his decision and required the Postal Service to rehire Bowen.

Additionally, the Court imposed attorneys fees and costs on both defendants.

(c) *The Opinion of the Court of Appeals*

The Court of Appeals affirmed the jury verdict and findings of the District Court to the extent they found APWU liable for breach of the duty of fair representation and the Postal Service liable for discharging Bowen in breach of contract. The award of attorneys fees and costs against both defendants was also affirmed. However, the Court of Appeals, following this Court's reasoning in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), reversed the award of compensatory damages for lost wages in the sum of $30,000 against the Union.

The Court stated (Appendix A to Petition for Certiorari p. A 5);

> "I. As Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations—$47,000 plus $5,954.12—was chargeable to the Union. Cf. *Vaca* v. *Sipes*, 386 U.S. 171, 195 (1967)."

The Court affirmed the judgment against the Postal Service for back wages of $17,000 plus the additional $5,954.12.

In a revised opinion (Appendix A) the Court added a footnote (f.n. 6) which stated that since plaintiff had never appealed from the judgment against the Postal Service in the sum of $22,954.12, the sum of $30,000.00 could not be added to the judgment against the Postal Service.

Charles V. Bowen now petitions this Court to review both the holding of the Court of Appeals that since the employer is exclusively liable for the payment of lost wages the union is not chargeable in damages for that loss and the refusal of the Court of Appeals to alter the judgment against the Postal Service.

American Postal Workers Union opposes the granting of Certiorari on the first issue and takes no position on the second one.

REASONS FOR DENYING THE WRIT

A. The Decision Of The Court Of Appeals Is Entirely Consistent With Prior Holdings Of This Court

This Court has on several occasions enunciated the law with regard to compensatory damages in duty of fair representation cases. Unfortunately for Petitioner that law is contrary to what he contends in this case. There is thus no important question of federal law presented for review.

The leading case is *Vaca* v. *Sipes*, 386 U.S. 171 (1967) which, like this case, was one where the union declined to take a grievance all the way to arbitration. The employee sued the union for breach of the duty of fair representation and, in a separate action, sued the employer for discharge in breach of the collective agreement. As in the present case, the complaint alleged that as a direct result of the wrongful breach of contract by the employer, plaintiff was damaged by the loss of wages.[3] In its decision, this Court

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[3] In this case the Complaint expressly stated, (Complaint, Par. 10), that, because of APWU's breach of duty, plaintiff was denied

unequivocally stated, "We hold that such damages are not recoverable from the Union in the circumstances of this case." 386 U.S. at 195. Observing that the appropriate remedy for a breach of the duty of fair representation must vary with the circumstances of each breach, the Court noted that the complaint was that the union failed to afford the employee the arbitration remedy but the damages sought by plaintiff were "primarily those suffered because of the employer's alleged breach of contract." 386 U.S. at 195-196.

The Court added that even if it is assumed that the employee had been wrongfully discharged and the Union improperly failed to resort to arbitration, there is no reason to exempt the employer from contractual damages which he would otherwise have to pay. 386 U.S. at 196.

Later in its opinion the Court discusses which elements of damages may be charged to the union. It concludes that lost wages are peculiarly an obligation of the employer.

> "[M]ay an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; . . . "
>
> *Vaca* v. *Sipes*
> 386 U.S. 171, 197.

The Court then explained that one reason for this result was that it could be a real hardship to require unions to

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gainful employment and, (Para. 11), that the Postal Service was joined to make it "a party to any portion of the judgment herein *which relates to Plaintiff's employment rights and related benefits.*" (Emphasis added).

pay such back wage claims when the employee is able to sue the employer directly. It was clear, said the Court, that even if the union had breached its duty, nearly all the damages—wages—were attributable to the initial wrongful discharge. 386 U.S. 171, 197-198.

This Court distinguished the situation where a union affirmatively causes the employer to commit the alleged breach of contract from the one where, as in the present case, the union played no part in the employer's original breach. In the former case the Court noted that the National Labor Relations Board had held the union and employer jointly liable for back pay. But it expressly declined to apply this rule to the latter situation in these words:

> "Since the Union played no part in Swift's alleged breach of conduct and since Swift took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted."
>
> *Vaca* v. *Sipes*
> 386 U.S. 171, 198 f.n. 18

Three years later this Court decided *Czosek* v. *O'Mara*, 397 U.S. 25 (1970), where the same principles were reiterated. That case arose under the Railway Labor Act where the employee must pursue the employer before the Railway Adjustment Board before suing in court. Since that had not been done the lower court dismissed the employer from the case, while the union was found to have breached its duty of fair representation. The union appealed the lower court's dismissal of the lawsuit as against the employer because it feared it might be forced to pay damages for which the employer is responsible, i.e., wages. The Supreme Court assured the union its fears were groundless. "Judgment against [the union] can in any event be had only for those damages that flowed from their own conduct. . . . [D]amages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and

expense of collecting from the employer." 397 U.S. 25, 29.

More recently, in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), the Court, while holding that punitive damages could not be imposed against a union in duty of fair representation cases, took the occasion to reiterate the compensatory damage rule of *Vaca* v. *Sipes* and explain its rationale. The following excerpt makes it conclusive that lost wages may not be recovered against the union:

> "The Court in *Vaca* applied the compensation principle not only to gauge the sufficiency of relief but also to limit union liability. Because an employee can recover in full from his employer for its breach of contract, we reasoned that a union which fails to process a grievance predicated on that breach cannot be held liable for damages attributable to the employer's conduct. Id., at 197. . . . Recognizing the 'real hardship' that large damage awards could impose on unions, the Court found 'no merit in requiring [them] to pay the employer's share of damages.'' Ibid. . . . Although acknowledging that this apportionment rule might in some instances effectively immunize unions from liability for a clear breach of duty, the Court found considerations of deterrence insufficient to risk endangering the financial stability of such institutions. Id. at 198, . . ." (Emphasis added) *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 49-50 (1979).

The Petition for Certiorari quotes copiously from this Court's opinions in *Vaca* v. *Sipes*, *Czosek* v. *O'Mara*, and *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, as well as *Clayton* v. *International Union, United Automobile Workers*, —— U.S. ——; 49 USLW 4550, 4553 f.n. 15. The sections quoted, however, all stand for the undisputed proposition that in cases of this type some of the damages suffered by the discharged employee will be attributable to the employer's breach of contract and some to the union's breach of duty. Petitioner has chosen to ignore the more specific portions of those opinions, par-

ticularly those in *Vaca* v. *Sipes, Czosek* v. *O'Mara* and *International Brotherhood of Electrical Workers* v. *Foust,* set forth by Respondent Union, *supra,* which expressly state that where there has been an illegal discharge and a subsequent breach of duty by the union, lost wages, as such, are the obligation of the employer and not the union because it was the employer's breach which set the events in motion and the payment of wages is uniquely the employer's function.

Here the employee sued both the employer and the union and hence the employer was available to respond in damages. The Trial Court erroneously apportioned Petitioner's lost wages between the Postal Service and APWU in direct contravention of the principles established in *Vaca* v. *Sipes* and its progeny. The Court of Appeals, following this Court's reasoning in those cases, properly held that it was error to assess back wages against APWU.

It is true, as Petitioner notes, that in *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), Justice Stewart, concurring, observed that an employer relying on a favorable arbitration award should not be required to bear liability for damages for the intervening wage loss and that the union should. Whatever may be said of the validity of that position, the fact is that in the present case, unlike *Hines,* there was no arbitration upon which the employer relied in refusing to reinstate the employee. Justice Stewart was dealing with a situation where the refusal to reinstate, resting on an arbitrator's decision declaring the discharge proper, could not be "anything but rightful, until there is a contrary determination." 424 U.S. 573. Here the discharge was the unilateral act of the employer, was illegal *ab initio* and remained so throughout. There is thus no basis for exempting the employer from the normal assessment of damages and shifting it to the union.

B. Courts Of Appeals Have Consistently Applied The Rule That Lost Wages Are Not Attributable To Unions. There Is No Conflict Of Circuits To Resolve.

Petitioner asserts, (Brief p. 16), that in *Foust* v. *International Brotherhood of Electrical Workers,* 572 F.2d. 710 (10th Cir. 1978), the Tenth Circuit affirmed an award of compensatory damages, including wages, against the union and hence a conflict among circuits exists. The answer is twofold: First, the Tenth Circuit in *Foust* did not decide the issue whether an award of compensatory damages against the union was proper. The Court expressly noted that in the District Court the union had not objected to the instruction given on the measure of damages and therefore on appeal was merely challenging the sufficiency of the proof of such damages. 572 F.2d 710, 718. Second, this Court's discussion of damages in the *Foust* case, *supra,* p. 9, expressly approved the rule of damages established in *Vaca* v. *Sipes* discussed above.

Courts of Appeals, including the Fourth Circuit in an earlier case, have consistently applied this Court's reasoning that unions can only be liable for damages directly caused by their breach of the duty of fair representation, that lost wages resulting from an improper discharge are the responsibility of the employer and that the union remains liable only to the extent it added to the difficulty and expense of collection. *Czosek* v. *O'Mara,* 397 U.S. 25, 29 (1970).

In *Self* v. *Drivers, Chauffeurs. Warehousemen, etc.,* 620 F.2d 439 (4th Cir. 1980), the Fourth Circuit reversed a judgment awarding discharged employees back wages against a union that allegedly breached its duty of fair representation. There, as here, the District Court had rendered a decision against the union on the basis of what might have happened had the union not breached its duty, including the speculation that the employees might well have been restored to their jobs.

The Court of Appeals rejected this approach:

> "Although we accept the factual findings of the District Court, the judgment rendered against the Union cannot stand. The record does not demonstrate that the Union *caused* the conduct for which the plaintiffs were discharged; therefore, the Union cannot be held liable for the losses of the plaintiffs ensuing from their dismissals. The District Court's conclusions rest on mere conjecture—on the assumption that plaintiffs might not have been discharged, or might have been reinstated but for the Union's improper action or inaction. . . . Whatever the record may show of the Union's shortcomings, it is the plaintiffs who are responsible for the conduct on which their discharges rested. (footnote omitted)
>
> *Self* v. *Drivers, Chauffeurs, Warehousemen, etc.*, 620 F.2d 439 at 443.

In the end the Court awarded the plaintiff employees only those costs incurred in seeking a fair resolution of their claim against the employer—attorneys fees and costs. 620 F.2d at 444. Cf. *Anderson* v. *United Paperworkers International Union*, 641 F.2d 574 (8th Cir. 1981).[4]

Another example of what might be included as independent damages against the union is found in *Scott* v. *Anchor Motor Freight, Inc.* 496 F.2d 276 (6th Cir., 1974). The *Scott* case was a suit for breach of the duty of fair representation

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[4] In *Self* the Fourth Circuit itself distinguished the case relied upon by Petitioner (Brief p. 16) to show that the Fourth Circuit previously ruled that lost wages are a proper element of compensatory damages. *Harrison* v. *United Transportation Union*, 530 F. 2d 558 (4th Cir. 1975.), *cert. denied*, 425 U.S. 958 (1976). The Court explained that in *Harrison* the employee had lost any right of action against his employer under the Railway Labor Act because of the deliberately misleading conduct of the union, hence there was nowhere else to look for a remedy. *Self* v. *Drivers, Chauffeurs, Warehousemen, etc.*, 620 F. 2d 439, 444. That was not the case in *Self*, nor is it the case here.

by the union and improper discharge by the employer. A jury had found both the union and the employer liable. In its charge to the jury on damages the Trial Court had instructed that the employer could only be liable for those damages directly caused by the wrongful discharge—lost wages and related items. The Sixth Circuit approved this portion of the charge, *Scott* v. *Anchor Motor Freight, Inc.*, 496 F.2d 276, 281.

The Trial Court also advised the jury that it could award damages against the Union in an amount representing the extent of the difficulty and expense of collecting from the employer.[5] The Court of Appeals also approved this instruction and indicated that proper damages attributable to the union might include litigation costs and attorneys fees, but that such items, like any other element of damages, must be proven on trial. 496 F.2d at 281-282. The Court reversed and remanded for proper admission of proof as to the actual amount of ligitation costs chargeable to the union.

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[5] Counsel for APWU independently inquired of counsel for the union in the *Scott* case and confirmed that the Trial Court instructed the jury that lost wages could only be recovered from the employer and not the union.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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SUPPLEMENTAL BRIEF FOR RESPONDENT, AMREICAN POSTAL WORKERS UNION, AFL-CIO IN OPPOSITION

STATEMENT

Respondent American Postal Workers Union, AFL-CIO, pursuant to Rule 22.6, files this supplemental brief in opposition to the Petition for a Writ of Certiorari herein, for the purpose of calling the Court's attention to the case of *Milstead* v. *Teamsters Local, 957*, No. 81-258, in which this Court denied a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on October 13, 1981. That case presented the same issue as is presented herein. The case below was styled *Milstead* v. *Teamsters, Local 957*, Sixth Circuit, No. 80-3005, decided May 13, 1981, unofficially reported at 107 LRRM 2452.

Respondent American Postal Workers Union, AFL-CIO also states that, through inadvertence, the citation to the case known as *Scott* v. *Anchor Motor Freight, Inc.*, 496 F.2d 276 (6th Cir. 1974) found on pages 12 and 13 of Respondent's Brief in Opposition failed to note that this Court denied a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in that case. *Anchor Motor Freight, Inc.* v. *Scott*, 419 U.S. 868 (1974).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 81-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES V. BOWEN, *Petitioner*

v.

UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. The Fourth Circuit Ruled Broadly, and as a Matter of Law, on the Issue of Union Responsibility for Wages Lost through the Union's Fault, and the Decision is not Narrowly Limited to the Facts of this Case.

Contrary to the argument of the respondent United States Postal Service ("Postal Service" or "employer") in the Memorandum for Federal Respondent in Opposition, at 4-5, the Fourth Circuit's holding in this case regarding a union's liability for wages that it has caused to be lost is not narrowly limited to the facts of this case. The Fourth Circuit's treatment of the issue is as broad as it is brief. Making no reference to the particular facts of this case, the Fourth Circuit flatly stated, without qualification, that

> As [petitioner] Bowen's compensation was at all times payable only by the [Postal] Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations—$47,000 plus $5,954.12—was chargeable to the Union.

(Pet. at A5.) The Solicitor General's wishful thinking notwithstanding, the decision of the Fourth Circuit on its face clearly stands for the broad principle that a union may not be held liable for an employee's lost wages, regardless of the union's fault in causing the loss.

It is also clear from the disposition of this case in the Fourth Circuit that the opinion is not limited to its facts. As the respondent American Postal Workers Union ("Union") recognizes, the original $52,954.12 damage award in this case constituted reimbursement for lost wages. (Brief for Respondent Union in Opposition, at 3,5.) The jury and the trial court, assessing the responsibility of each respondent for the loss of wages, found the employer initially at fault due to the wrongful discharge. In the ordinary course, the employer's fault and its concomitant liability for lost wages would have extended until the date of reinstatement. But having found that the Union, too, wronged the petitioner by failing to represent him fairly, and believing the law regarding Union liability to be that which petitioner advances in this Court, the jury found that the Union, through its intervening fault, assumed responsibility for the continua-

tion of lost wages after the date that proper Union action would have restored petitioner to his employment. A second layer of Union fault was thus superimposed upon the employer's original—and continuing—fault.

The Fourth Circuit's decision absolved the Union from paying any damages composed of lost wages. Any ruling that, on the facts presented, the Union did not *cause* any damages would have required a reversal of the jury's basic finding of fault as to the Union. The Fourth Circuit, however, affirmed the finding of Union fault. Any holding that the Union did not cause any of petitioner's loss of wages would perforce have required reallocation of all lost wages to the employer, who wrongfully discharged petitioner. Yet this the Fourth Circuit explicitly refused to do. Thus, the very nature of the disposition of this case demonstrates that the Fourth Circuit ruled, as a matter of law, that where a union's fault causes lost wages, the union may not be required to respond in damages for the loss.

The Solicitor General agrees with petitioner that the Fourth Circuit's legal ruling on union liability is erroneous. (Memorandum for the Federal Respondent in Opposition, at 4.) Since that ruling is not narrowly limited to the facts of this case, petitioner urges that, for the reasons stated in the Petition, the question deserves plenary review.

II. Crucial Distinctions Separate the Case at Bar from *Milstead* v. *International Brotherhood of Teamsters, Local 957*, in Which this Court Recently Denied a Petition for a Writ of Certiorari.

This Court's recent denial of a petition for a writ of certiorari in *Milstead v. International Brotherhood of Teamsters, Local 957*, 649 F.2d 395 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3278 (No. 81-258, October 13, 1981), which was brought to this Court's attention in the

Union's Supplemental Brief in Opposition, should not influence this Court's action on the case at bar. First, before the *Milstead* case reached this Court, the employer there settled with the injured employee for an amount greater than the original trial jury had awarded against the employer. 649 F.2d at 396. This settlement strongly suggests that the employer in *Milstead* recognized the possibility that it might be assessed with additional lost wages that the trial jury originally awarded against the union. More importantly, the injured employee in *Milstead* thereby settled all of his lost wage claims before this Court had a chance to address the question of liability for lost wages. Since all claims for lost wages may have been settled, *Milstead* did not present the issue of potential union liability for lost wages in a clear-cut form. While denial of a writ of certiorari of course has no precedential effect, that denial should be especially meaningless here.

Moreover, the Solicitor General argues the facts of *Milstead* as a reason why this Court should refuse to require reallocation of the full amount of petitioner's lost wages to the Postal Service. (Memorandum for the Federal Respondent in Opposition, at 6-7, n.1.) But the fact that in *Milstead* the employer and the employee settled their differences points to a critical distinction between *Milstead* and the case at bar and strongly argues for the injustice of the result decreed by the Fourth Circuit here. If the Fourth Circuit's ruling that a union cannot be held liable for lost wages is allowed to stand, *Vaca v. Sipes*, 386 U.S. 171, 186 (1967), *requires* that the employer be held liable for all lost wages. No other result is consistent with *Vaca*. The employer could, of course, as in *Milstead*, settle all existing and possible claims against it, and thereby avoid part of its fair liability. The injured employee in that case would have no room to complain. But here the employer whose fault initiated the loss has not settled, and if the Union is to be allowed to escape liability for lost wages, the employer

must bear all the consequences of its breach of the bargaining agreement.

In arguing that the Fourth Circuit properly refused to reallocate all lost wages to the Postal Service because petitioner "was not entirely successful in the district court," the Solicitor General misreads the record in this case and the law governing unfair representation suits. (Memorandum for the Federal Respondent in Opposition, at 6.) Petitioner most clearly was entirely successful at the trial level. The verdict at trial included a full award of petitioner's lost wages plus punitive damages, attorneys' fees, and costs based on findings that both the Postal Service and the Union recklessly and callously violated petitioner's rights. If this is not being "entirely successful," then no plaintiff in an unfair representation action can ever claim entire success. The award of punitive damages, of course, could not stand under the law as it has developed. Moreover, contrary to the Solicitor General's statement, it has long been the law in unfair representation cases that an employer and a union *cannot* be made jointly and severally liable for an award of back wages absent rare circumstances that were not applicable to the case at bar. *Vaca v. Sipes*, 386 U.S. at 197, n.18. Thus, as petitioner has previously argued, the Fourth Circuit has erroneously ruled that a successful plaintiff in an unfair representation action must nevertheless appeal, lest appellate reversal on a point of law as to the union defendant deprive the successful plaintiff of his full award of lost wages.

Conclusion

It is apparent from the diametrically opposing arguments that can be derived from this Court's line of decisions following *Vaca v. Sipes, supra*, that the question of union liability for wages lost because of the union's fault is unresolvable based on existing precedent. The Fourth, Sixth and Eighth Circuits are in irreconcilable conflict on this point.

As the result in the case at bar graphically demonstrates, the consequence of this conflict is that an employee wronged by both his employer and his union may unjustly lose most of the compensatory damage award to which he is undisputedly entitled. The present state of confusion in the law will inevitably lead to additional unjust results, all of which will defeat the fundamental purpose of an unfair representation action—to make the injured employee whole. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48-49 (1979).

If this Court believes that lost wages may never be recovered from a union, regardless of the union's fault, petitioner respectfully suggests that this Court owes it to the working public and to the Bar to say so clearly. Petitioner likewise urges that, if this is to be the law, the decision of the Fourth Circuit in this case must be reversed and remanded for assessment of all lost wages against the Postal Service, lest the fault of the union be allowed to shield the employer from the consequences of its own wrongdoing, and the doubly injured employee thereby lose his remedy.

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Petitioner's Brief

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BRIEF FOR PETITIONER

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January, 1982

QUESTIONS PRESENTED FOR REVIEW

I. Whether a union, whose adjudicated breach of its duty of fair representation caused a loss of wages beyond the loss that would have occurred if the union had fulfilled its duty, may be required to pay as compensatory damages the amount of the wage loss caused by the union's fault.

II. Whether this court should exercise its supervisory powers in the interests of justice to restore petitioner's full award of damages where that award has been substantially reduced by the Fourth Circuit's belated and erroneous ruling that petitioner should have appealed from a judgment in his favor in order to contest the district court's apportionment, among the culpable wrongdoers, of petitioner's uncontested damages.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment order, findings of fact, and conclusions of law of the United States District Court for the Western District of Virginia were entered on May 10, 1979, and are reprinted as appendices to the petition at Pet. A12-A20.[1] The findings and

[1]The pertinent documents from the record in this case are reprinted as appendices to the petition and are referred to in accordance with Rule 30.1 of the Supreme Court Rules.

Pages in the petition appendix are cited as "Pet. A____." Pages in the trial transcript are cited as "Tr. ____," and documents in petitioner's grievance

conclusions are reported at 470 F. Supp. 1127 (W.D.Va. 1979). The opinion of the United States Court of Appeals for the Fourth Circuit, as issued on February 23, 1981, and rewritten on July 7, 1981, is reported at 642 F.2d 79 (4th Cir. 1981) and is reprinted at Pet. A1-A11.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The original judgment of the Fourth Circuit was entered on February 23, 1981. Timely petitions for rehearing and suggestions for rehearing *en banc* were filed by both respondents on April 8, 1981, pursuant to an order of the Fourth Circuit extending the time for filing such petitions until April 9, 1981 (Pet. A24), and were denied by the Fourth Circuit in an order dated May 29, 1981 (Pet. A25). On June 8, 1981, the respondent United States Postal Service ("Postal Service") moved the Fourth Circuit for a stay of mandate in order that it might file a petition for a writ of certiorari. The Fourth Circuit granted this motion (Pet. A26).

On July 7, 1981, while the stay of mandate was in force, the Fourth Circuit issued a "rewritten" page 7 of its opinion of February 23, 1981, adding footnote 6 on page 7 of the slip opinion (Pet. A5). The transmittal letter from the Clerk dated July 7, 1981, is reprinted at Pet. A27-A28. Petitioner Charles V. Bowen

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file, which was introduced in a tabbed format as Court Exhibit No. 2, are cited as "Ct. Ex. 2, Tab____."

Since this Court granted a writ of certiorari only on issues of law, both petitioner and respondent United States Postal Service deemed the documents already reproduced in the petition to be the only parts of the record, under Rule 30.2, that this Court need examine and so notified respondent American Postal Workers Union ("Union"). The Union, however, decided to designate selected testimony concerning the qualifications and opinions of an expert witness, the Union's efforts to represent petitioner, petitioner's contacts with the Union while the Union was representing him, and selected portions of petitioner's grievance file. Due to logistical and financial considerations, the Union voluntarily assumed responsibility for printing the Appendix. Petitioner, as permitted by the Rules, has omitted citation to this appendix.

("Bowen" or "petitioner") filed a petition for rehearing and suggestion for rehearing *en banc* on July 21, 1981, within 14 days of the issuance of the rewritten opinion of the Fourth Circuit. Meanwhile, the Postal Service allowed the stay of mandate to expire and did not apply for a writ of certiorari. The Fourth Circuit denied Bowen's petition for rehearing on September 15, 1981.

In order to protect against the expiration of possible time requirements, Bowen originally submitted his petition for a writ of certiorari on August 27, 1981.[2] After being held by the Clerk until final action by the Fourth Circuit regarding rehearing, Bowen's petition was filed on September 15, 1981. This Court granted Bowen's petition for a writ on December 7, 1981.

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a),[3] provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court

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[2]Due to the unusual nature of the Fourth Circuit's proceeding in this case—the reissue, on July 7, 1981, of the opinion of February 23, 1981, long after all rehearing motions regarding the February opinion had been denied—petitioner was uncertain whether a petition for a rehearing filed on July 21, 1981, was "timely" so as to toll the period for filing a petition for a writ of certiorari in this Court. If calculated from the denial of the earlier petitions for rehearing on May 29, the period for filing in this Court would have expired on August 27, 1981.

[3]The analogous provision of the Postal Reorganization Act, 39 U.S.C. 1208(b), provides:

> (b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

(a) The Parties

Petitioner Bowen was employed by respondent Postal Service from April, 1974, until he was relieved of duty after February 21, 1976, and discharged on March 30, 1976. Respondent American Postal Workers Union ("Union") was Bowen's collective bargaining representative.

(b) The Facts

In December, 1976, Bowen filed a complaint in United States District Court alleging that his dismissal by the Postal Service occurred without just cause, thus violating the applicable collective bargaining agreement, and also alleging that the Union failed to represent him fairly and adequately in the applicable contractual grievance process. The action was brought pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), 28 U.S.C. § 1337, and 39 U.S.C. § 409.[4]

The evidence at trial showed that Bowen's supervisors and fellow employees constantly harassed him on the job. (Tr. 56-62, 197-201, 207.) Bowen was the brunt of jokes and was referred to as a homosexual. (Tr. 57, 117, 198-99, 205.) It was suggested that Bowen was mentally retarded. (Tr. 198-99.) Bowen's supervisor often stated publicly that he was going to "get rid of" Charlie Bowen. (Tr. 59, 198, 200, 224.)

On February 21, 1976, a particular employee was harassing and badgering Bowen, and Bowen finally sought and obtained permission to go home. (Tr. 64-66.) As he was leaving the building, Bowen and that employee met by chance in a stairway, exchanged words, and scuffled briefly. (Tr. 66-69, 369-72.) No

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[4]No party has contested these jurisdictional bases, although technically the pleadings might have alleged as additional jurisdictional bases 39 U.S.C. §§ 1203(a) and 1208(b).

serious injury or damage resulted. (Tr. 67-68, 373-74.) Neither participant reported the matter. (Tr. 370-71.)

Bowen was not allowed to return to work for the Postal Service. (Tr. 69, 71.) Having learned indirectly of the scuffling incident (Tr. 370-71), the Lynchburg Postmaster suspended Bowen pending the completion of an investigation. On March 15, 1976, the Postmaster notified Bowen by letter that he proposed to dismiss Bowen for three reasons (Tr. 71, 77-79; Ct. Ex. 2, Tab 20):

1. the alleged "assault" on February 21, 1976;
2. failure to report for and pass a qualifying test within thirty days from January 31, 1976; and
3. failure to report for and pass another qualifying test by April 2, 1976.

As to the first stated reason, Bowen's antagonist testified at trial that he considered the matter so insignificant that he did not even report it. (Tr. 370-72.) As to the second reason, evidence presented at trial showed that during the latter portion of the thirty-day period, the Postal Service had prevented Bowen from reporting for work. (Tr. 69-71, 80.) As to the third reason, the specified period still had eighteen days to run as of the date of the Postmaster's letter, and evidence presented at trial showed that in fact Bowen passed the test before the period expired. (Tr. 80.)

On March 30, 1976, the Postmaster terminated Bowen (Ct. Ex. 2, Tab 16), who then filed a grievance with the local Union. The local Union president himself investigated the February 21, 1976, incident and took tape-recorded statements. (Tr. 400-02.)

The Union's investigation disclosed evidence, later adduced at trial, showing that Bowen had long been the subject of unwarranted and harsh treatment and constant harassment and ridicule by both his fellow employees and his supervisors. The Union investigation also revealed that Bowen's principal supervisor had frequently said he was going to "get rid of" Bowen. (Tr. 195-99, 223-24, 227, 424-26; Ct. Ex. 2, Tabs 8, 26.)

The Union representatives involved at each successive step of the grievance process, having failed to obtain Bowen's reinstatement, recommended Bowen's case for further pursuit by the Union. (Tr. 426.) Ultimately, a Union official recommended to the Union's national office, where decisions concerning arbitration were made, that the grievance be certified for arbitration. (Ct. Ex. 2, Tabs 4, 5.) The file transmitted to the Union's national office carried a notation that whoever reviewed the file should listen to the statements that the local Union president had tape-recorded because they revealed serious inconsistencies in the Postal Service's case against Bowen. (Ct. Ex. 2, Tabs 9, 12.)

The final decision regarding arbitration of Bowen's grievance lay with a three-man arbitration board at the Union's national level. (Tr. 316, Ct. Ex. 2, Tab 3.) The members of the board divided all cases among themselves, each making final decisions on his alloted cases without consulting the other board members. (Tr. 322.)

A national Union official finally got around to reviewing Bowen's file after returning from a two-week Union meeting in Las Vegas. (Tr. 317-18.) By this time the contractual time limit for requesting arbitration had expired, but the Union was working under a brief extension of time granted by the Postal Service. Faced with a backlog of late cases, this official, on the day he reviewed Bowen's file, rejected arbitration on all cases on which he acted, including Bowen's. (Tr. 320; Ct. Ex. 2, Tab 27.)

With reference to Bowen's particular case, this national Union official admitted at trial that he spent only fifteen to thirty minutes reviewing Bowen's file. (Tr. 321; *see* Tr. 323-24.) He admitted that he did not listen to the tapes of witness interviews to which his attention had specifically been called. (Tr. 420, 428-29.) He testified that he disregarded the numerous comments in the grievance file in which lower-ranking Union officials questioned the propriety of Bowen's discipline and recommended the case for arbitration. (Tr. 425-26.)

Qualified witnesses for both the Union and the Postal Service testified from their experience concerning the usual and predictable time required for completion of the arbitration process. The witnesses testified that a decision would have been

reached within six (6) months to one (1) year if arbitration had been pursued. (Tr. 485-87.)

The national Union official's refusal to recommend Bowen's case for arbitration effectively barred Bowen's opportunity to obtain relief through the grievance and arbitration process. (Tr. 362, 396; Pet. A15.) Bowen then filed this action.

(c) The Judgment in the District Court

Because of the quasi-governmental character of the Postal Service, the trial court was by statute the finder of fact as to it. A jury was impaneled as finder of fact as to the Union, and the same jury also sat in an advisory capacity as to the Postal Service.

On a special verdict form (reprinted at Pet. A21-A23), the jury found that the Union, as Bowen's bargaining representative, had breached its duty of fair representation owed to Bowen (Jury finding No. 1, Pet. A21); that the Postal Service had discharged Bowen without just cause in violation of the collective bargaining agreement (Jury finding No. 2, Pet. A21); and that both the Union and the Postal Service had acted "maliciously or recklessly, or in callous disregard" of Bowen's rights (Jury findings Nos. 4 and 6, Pet. A22).

The amount of Bowen's back wage damages was stipulated by all parties before trial and was never contested, and the jury found that $47,000 represented the compensatory damages due Bowen. (Jury finding No. 3, Pet. A21-A22.)[8]

The District Court instructed the jury to divide damages between the Postal Service and the Union according to the fault of each. (Tr. 600-602.) On its verdict form, the jury attributed $30,000 of the lost wages to the Union and the remaining $17,000 of lost wages to the Postal Service. (Jury finding No. 8, Pet.

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[8]The parties stipulated that Bowen lost $45,389.87 in back wages and fringe benefits from the time of discharge until trial. (Tr. 315.) In closing argument, however, Bowen's counsel accidentally stated this figure as $47,000 (Tr. 550), and the jury apparently adopted the suggestion, thereby adding $1,610.13 to the loss, without comparing it to the actual stipulation. The trial court in turn adopted the jury finding. (Court finding No. 7, Pet. A15.)

A22.)[6] The special jury verdict also awarded Bowen $10,000 in punitive damages against the Union and $30,000 in punitive damages against the Postal Service. (Jury findings Nos. 5 and 7, Pet. A22.)

The trial court subsequently issued a judgment order along with findings of fact and conclusions of law. (Pet. A12-A20.) The trial court found that "[i]f [Bowen's] grievance had been arbitrated as provided for in the collective bargaining agreement of the parties a result could have been anticipated by approximately August, 1977, reinstating [Bowen] in his employment." (Court finding No. 9, Pet. A15.) The court also found that "[b]ased on the facts in evidence it is proper for the Court to infer that [Bowen] would have been returned to his job earlier if [the

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[6]This apportionment ratio of 30:17 is consistent with the evidence based upon the earliest possible arbitration award in favor of Bowen. The jury assigned the Postal Service responsibility until February, 1977, when an arbitration would have reinstated Bowen. (Tr. 485-86.) The jury assigned the Union responsibility for the additional wages lost from the time of the earliest possible arbitration decision until trial, after which the Postal Service was required to reinstate Bowen or pay him additional damages.

Thus, of the 34 months between Bowen's last employment by the Postal Service (February, 1976) and trial (December, 1978), the first twelve were clearly the Postal Service's responsibility. Twelve thirty-fourth's (12/34) of $47,000 equals $16,588.24, which the jury apparently rounded to a $17,000 award against the Postal Service. Responsibility for the remaining twenty-two (22) months of unemployment, after arbitration would have reinstated Bowen, was assigned to the Union since it represented an increase in Bowen's losses that would have been avoided but for the Union's breach of duty. Twenty-two thirty-fourths (22/34) of $47,000 equals $30,411.76, which was apparently rounded down to a $30,000 award against the Union.

The district court's findings were likewise consistent with the evidence, because it could have taken as long as a year from August, 1976, for the arbitration process to reinstate Bowen. (Tr. 485-487.) The jury finding apparently was based on the shorter estimate of six months, which was provided by the Union witness. (Tr. 485-486.)

While the Union seasonably objected to the Court's instructions that allowed the jury to apportion *any* compensatory damages to the union (Tr. 611-612), no party objected to the actual apportionment in the event that some apportionment was deemed proper, and no party suggested any different formula for apportionment.

Union] had fulfilled its duties and that [Bowen] could not proceed independently of [the Union] and reasonably relied upon [the Union] to protect his rights." (Court finding No. 10, Pet. A15.)

The trial court found that the Postal Service discharged Bowen without just cause in reckless and callous disregard of Bowen's rights. The Court affirmed the jury's verdict that the Union handled Bowen's meritorious grievance in an arbitrary and perfunctory manner and in reckless and callous disregard of Bowen's rights. (Court findings Nos. 4 and 5, Pet. A15.)

Judgment was entered on May 11, 1979, on Bowen's behalf for $52,954.12 in compensatory damages in accordance with the jury verdict and the trial court's findings and conclusions. (Pet. A12.) (The judgment amount included an additional $5,954.12 in stipulated compensation that Bowen lost between trial and the date of the judgment order.[7]) (Court findings Nos. 7 and 8, Pet. A15.) As part of its order, the trial court apportioned the compensatory damage award between the Postal Service and the Union in accordance with the jury verdict. (Conclusion No. 4, Pet. A17-A18.) The trial court also ordered the Postal Service to reinstate Bowen or to pay him a specific amount of additional damages in lieu of his anticipated earnings. (Court findings Nos. 11 and 12, Pet. A15-A16; Conclusion No. 7, Pet. A19.)

Bowen was also awarded $20,000 in attorneys' fees, $15,000 to be paid by the Postal Service and $5,000 to be paid by the Union, and he was awarded costs. (Court findings Nos. 13-15, Pet. A16; Conclusion No. 8, Pet. A19.) The trial court ruled, however, that sovereign immunity barred recovery of punitive damages against the Postal Service and that it would therefore be unfair to impose punitive damages only against the Union. The portion of the jury verdict awarding punitive damages against the Union was thus set aside. (Conclusion No. 5, A18.)

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[7]This loss of wages was assigned to the fault of the Postal Service since it accrued after trial and thus covered a period during which the Postal Service could have been expected to reinstate Bowen. The Union's action or inaction was no longer the cause of Bowen's losses.

(d) The Fourth Circuit's Decisions

On appeal to the United States Court of Appeals for the Fourth Circuit, both the Union and the Postal Service contested the sufficiency of the evidence underlying the judgment against them and challenged the admissibility of certain evidence. The Postal Service also challenged the District Court's order requiring either Bowen's reinstatement or the payment of additional damages and contended that attorneys' fees could not properly be awarded against it. The Union argued that no part of Bowen's lost wages could be assessed against the Union as compensatory damages.

No party, however, contested that Bowen would be owed $52,954.12 in lost wages if liability were affirmed. Bowen, who had been awarded judgment reinstating him in his job and all the compensatory damages to which he believed himself entitled, did not appeal.[8]

On February 23, 1981, a panel of the Fourth Circuit affirmed the District Court judgment in all respects except that the Fourth Circuit ruled that no compensatory damages in the form of lost wages could be assessed against the Union. The panel's decision affirmed the findings of fault as to both the Union and the Postal Service, as well as the findings that each had acted maliciously or recklessly or in callous disregard of Bowen's rights. By affirming the district court's judgment in favor of Bowen for the full amount of his lost wages, the panel implicitly ruled that the Postal Service must pay all of those lost wages. Ruling broadly, the panel held:

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[8]The trial court's judgment order was filed before this Court decided, in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), that punitive damages cannot be awarded against a union in an action such as this. Since the trial court had reversed the jury award of punitive damages against the Union and refused to confirm the advisory jury verdict assessing punitive damages against the Postal Service, petitioner's attorneys noted a cross-appeal in order to preserve the issues regarding punitive damages. Petitioner's counsel soon withdrew the notice of cross-appeal, however, because it was fruitless as to the Union in the wake of *Foust*, and upon further consideration of the sovereign immunity defense it appeared similarly ill-fated as to the Postal Service.

> As Bowen's compensation was at all times payable only by the [Postal] Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations—$47,000 plus $5,954.12—was chargeable to the Union. *Cf. Vaca v. Sipes*, 386 U.S. 171, 195 (1967).

(642 F.2d at 82; Pet. A5.)

The Postal Service and the Union each thereupon petitioned the Fourth Circuit for a rehearing and suggested a rehearing *en banc*. The Postal Service challenged the ruling on apportionment and specifically observed that the panel's decision, by absolving the Union from paying back wage compensatory damages, left the responsibility for all of Bowen's lost earnings with the Postal Service. These petitions and suggestions were denied by the Fourth Circuit on May 29, 1981. (Pet. A25.)

On July 7, 1981, however, the Clerk of the Fourth Circuit transmitted to the parties a "rewritten" page seven of the panel opinion of February 23, 1981, which added a wholly new footnote directly after the citation to *Vaca v. Sipes:*

> [6] We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection we note that no appeal was entered by the plaintiff from the judgment against the Service in the amount of $22,954.12.

(642 F.2d at 82; Pet. A5.) (Clerk's transmittal letter reproduced at Pet. A27-A28.) This "rewritten" page summarily rescinded the major portion of the compensatory award of the jury and the district court which the Fourth Circuit had affirmed on February 23, 1981. After awarding Bowen his full, uncontested compensatory damages of $52,954.12 and denying all motions for rehearing, the panel by footnote six voided $30,000 of the jury verdict and reduced Bowen's compensatory award to a total of $22,954.12.

Bowen, treating the "rewritten" panel opinion of July 7, 1981, as a new final opinion of the Fourth Circuit, filed a timely petition for rehearing and suggestion for rehearing *en banc*. This petition and suggestion were likewise denied.

Bowen thereupon successfully petitioned this Court for a writ of certiorari on two issues: the propriety of assessing against the Union compensatory damages composed of wages lost because of the Union's breach of its duty of fair representation, and the propriety of the Fourth Circuit's unsolicited and summary reversal of the bulk of Bowen's stipulated compensatory damage award.

Neither respondent filed a cross-petition. Thus, no issue has been raised in this Court concerning the trial court's and jury's findings of fact or the sufficiency or admissibility of the evidence supporting those findings.

SUMMARY OF ARGUMENT

When a union with exclusive control over access to arbitration breaches its duty of fair representation, the results are nearly always measurable by wages lost because of the union's action or inaction. In the case of a discharge from employment, the union's breach causes an increase in the losses initiated by the employer's violation of the collective bargaining contract. *Vaca v. Sipes*, 386 U.S. 171 (1967), commanded courts to make whole in a single action an employee who has been wrongfully discharged and thereafter deprived of contractual recourse because his union has breached its duty of fair representation. This Court decreed that responsibility for the employee's damages should be apportioned between the employer and the union according to the fault of each.

The Postal Service wrongfully discharged Bowen. The Union breached its duty of fair representation by failing to demand arbitration that, if pursued, would have returned Bowen to work within six months to a year. The Union thus caused Bowen's loss of wages from the time he would have been reinstated, given proper Union action, until his discharge was overturned at trial.

The Union should pay these lost wages for two reasons. Both arise directly from our national labor policy of securing industrial peace by strengthening and encouraging the collective bargaining process. First, the grievance and arbitration procedure is the heart of the machinery of industrial self-government.

Where, as here, the union controls employee access to the grievance and arbitration process, that process will function properly only if the union performs its crucial role as the employees' exclusive representative. The union's duty of fair representation has arisen from § 301 because the duty is essential to carrying out the purpose of § 301—guaranteeing the enforceability of collective bargaining agreements.

The time-honored civil remedy for a breach of duty is assessing against the wrongdoer, according to his fault, the actual damages caused by the breach. The assessment serves two purposes: it compensates the injured, and it encourages the wrongdoer to behave properly in the future. *Vaca's* "governing principle" embodies this ancient remedial axiom. It should be applied to the Union in this case.

Second, the Union must pay the additional damage it has caused to Bowen in order to preserve the integrity of the collective bargaining process by fulfilling the employer's legitimate, bargained-for expectations. An employer who has agreed to binding arbitration of disputes obtains in return a contractual expectation that his liability for erroneous discipline will be promptly and finally fixed by the grievance process. The union's breach of its duty of fair representation destroys this contractual expectation of finality and permits an injured employee to recover damages that have greatly increased because of the union's default. In order that the intent of § 301—enforcement of the bargain—may be carried out, the apportionment of damages must not impose on the employer additional liability that he would not have borne if the union had fulfilled its duty of fair representation.

Justice Stewart, in his concurrence in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572-73 (1976), advocated precisely the apportionment principle for which Bowen argues here. The logic of that concurrence, which was the basis upon which Bowen's losses were apportioned below, should be adopted by this Court.

The NLRB has long enforced national labor policy by requiring unions to bear their fair share of lost wages whenever the loss is caused by the union's breach of its duty of fair representation. Given the NLRB's acknowledged expertise in

interpreting national labor policy and formulating appropriate remedies, the NLRB's longstanding practice in this area confirms the wisdom and propriety of requiring the Union to pay Bowen the wages he lost because of the Union's default. Absolution of the Union in this case will either create a conflict in the remedies available for breach of the duty of fair representation depending solely on choice of forum, or raise serious questions about the scope of the NLRB's remedial powers. Ironically, exoneration of the Union could also undermine the principal holding of *Vaca* itself, as the NLRB might then become the forum in which fuller relief would be available to individuals.

As the NLRB's experience demonstrates, imposition of compensatory liability for lost wages has neither bankrupted unions nor improperly chilled any appropriate exercise of union discretion in balancing collective responsibilities with the duty of fair representation owed to individual employees. The appropriate scope of discretion has been granted to unions by the judicial definition of the nature of a union's duty. No exemption from the universal rule of restitution is required to protect that discretion.

If this Court rejects the reasons, grounded in national labor policy, for requiring the Union to bear a share of Bowen's lost wages, in the alternative the Postal Service must be required to pay Bowen the full amount of his compensatory judgment. The Fourth Circuit erroneously treated the apportionment of damages in the district court as if a separate judgment against the Postal Service had been rendered. The Fourth Circuit therefore concluded that Bowen, by not appealing that judgment, forfeited his chance to recover full compensation. But Bowen obtained a single judgment for his full, stipulated and uncontested compensatory loss. Having completely prevailed in the trial court on all compensatory issues, Bowen had nothing from which to appeal.

Requiring a successful plaintiff to appeal from a judgment totally in his favor is procedurally illogical, would contribute nothing to appellate resolution of apportionment issues, and would require plaintiffs to both attack and defend the district court judgment simultaneously. Most importantly, the Fourth Circuit, through its misperception of the posture of this case and the true scope of its power, denied its own ability to carry out *Vaca's*

broad remedial mandate to make an injured employee whole in one action. Once the damages suffered by an employee have been agreed upon, it remains only to determine in what proportion the employer and the union must pay them. If the Union escapes liability here, the Postal Service must carry the full burden.

ARGUMENT

(a) Under this Court's Decisions Concerning Damage Awards for Breach of the Duty of Fair Representation, a Compensatory Award Against a Union Properly Includes Lost Wages Where the Union's Fault Has Caused the Loss of Wages.

This Court first enunciated the statutory duty of a collective bargaining representative to represent all members of the bargaining unit fairly in a Railway Labor Act case, *Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192 (1944). Subsequent cases firmly established that this duty of fair representation binds unions certified under the National Labor Relations Act as well, *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); *Ford Motor Co., v. Huffman*, 345 U.S. 330 (1953), and encompasses the enforcement as well as the negotiation of collective bargaining agreements. *Humphrey v. Moore*, 375 U.S. 335 (1964).

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court held that a union's breach of its duty of fair representation is not within the exclusive jurisdiction of the National Labor Relations Board ("NLRB" or "Board") even though the Board considers such a breach to constitute an unfair labor practice. This Court declined to find exclusive jurisdiction in the Board partly because of the judicial origin of the duty of fair representation, 386 U.S. at 180-81, and partly because of concern that the Board, bound as it is to promote the public interest in effectuating the policies of federal labor law, would prove an inadequate forum for the complaints of individual employees about the behavior of their collective bargaining representatives. 386 U.S. at 181-83. This Court deemed the traditional supervisory jurisdiction and remedial powers of courts of law to be essential to the proper enforcement of the duty of fair representation.

Where a union has wrongfully prevented the employee from exhausting his contractual remedies against the employer, the union's breach of duty becomes intertwined with an action against the employer for breach of the collective bargaining contract. 386 U.S. at 185-88. In *Vaca* this Court suggested that both wrongs are actionable in a single proceeding. 386 U.S. at 187, 197. The practical interrelationship between these two wrongs, and the need for a single forum in which the injured employee can be made whole, confirmed for the Court the wisdom of rejecting exclusive NLRB jurisdiction over a union's default.

At the same time, however, this Court recognized that the confluence of these two separate actions brought into newly-sharpened focus the problem of apportioning damages where both the employer and the union have wronged the employee. 386 U.S. at 187-88. This Court laid down a "governing principle": "*apportion* liability between the employer and the union *according to the damage caused by the fault of each*." 386 U.S. at 197 (emphasis added).

In *Vaca*, the employer was not before this Court, and the union was held, as a matter of law, not to have violated its duty of fair representation. The record in *Vaca*, moreover, apparently contained neither evidence nor findings of fact relevant to the proper apportionment of damages even if the union had been found liable. This Court's discussion of the damage issue was thus necessarily generalized.

Nevertheless, having directed the courts to "fashion an appropriate remedy" for both the employer's breach of contract and the union's breach of the duty of fair representation, this Court identified considerations bearing on apportionment. Of paramount concern was the allocation of damages according to the fault of each party in causing those damages. This Court foresaw that "in at least some cases, the union's breach of duty will have *enhanced* or *contributed* to the employee's injury." 386 U.S. at 187 (emphasis added). Recognizing the important deterrent effect of requiring a wrongdoer to pay for the consequences of his acts, this Court observed that compelling the employer to pay for the union's wrong would provide "slight deterrence, indeed, to future union misconduct." 386 U.S. at 187.

"The appropriate remedy" for a union's wrongdoing, as this Court recognized, "must vary with the circumstances of the particular breach." 386 U.S. at 195. In *Vaca*, for example, the jury awarded the employee his full lost wages, from date of discharge until trial, as damages to be borne entirely by the union. But since the employer's alleged breach of contract caused those damages to begin to accrue long before the union committed any wrong, such an award clearly did not reflect an appropriate allocation of fault and resultant responsibility for damages. Speaking directly to whether damages that were caused *solely* by the employer's fault should be apportioned, this Court said:

> A more difficult question is, what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable *solely* to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; . . . It could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the *employer's share* of the damages.
>
> *The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each.* Thus, damages attributable *solely* to the employer's breach of contract should not be charged to the union, but *increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.*

386 U.S. at 196-98 (footnote omitted; emphasis added).

The essential elements of this crucial passage are:

(1) Each wrongdoer who has caused injury to the employee must pay the damage that his fault has caused.

(2) The employer's breach of contract, which is usually unrelated to the union's breach of its duty, "triggers" the employee's loss of wages and is the *sole* cause of at least part of the employee's total damages.

(3) The employer, not the union, must be required to pay all damages caused solely by the employer's breach of contract.

(4) The union, not the employer, must pay any increase in the employee's damages that has been caused by the union's wrongdoing.

Since *Vaca*, this Court has never spoken directly to the question of apportionment of damages in a context where the fault of both the employer and the union has been established. In several instances, however, variations on the basic *Vaca* theme have elicited passing comments that shed light on the subject.

In *Czosek v. O'Mara*, 397 U.S. 25 (1970), this Court reviewed an action under the Railway Labor Act where the only proper defendant was the union. Under that Act, an employee whose union fails to press a grievance may press the grievance himself. The discharged employees in *Czosek* had failed to use this administrative avenue, and their failure to exhaust administrative remedies barred their claims for damages for breach of contract against the employer. Addressing the union's fears of being forced to pay damages for which the employer was responsible, this Court held:

> *[J]udgment against* [the union] *can in any event be had only for those damages that flowed from their own conduct*. Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except *to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the*

> *employer*. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer *for the portion of the total damages caused by each*.

397 U.S. at 29 (footnote omitted; emphasis added).

In *Czosek*, the employees' failure to press their own cases through the available grievance machinery barred a suit against the employer for breach of contract. Precisely this same failure rendered it impossible to hold that the union "caused" any portion of the discharged employees' lost wages. Assuming that the discharges were in fact wrongful, the employees' own failure to process their grievances caused the loss of wages after the time that the grievance machinery, if used, would have restored the employees to work. Under these circumstances, the union, if liable at all, was rightly responsible only for damages "to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." Appropriate damages might have included, for instance, the cost of hiring an attorney to represent the employees' interests in place of a union representative.

In *Vaca* this Court admonished that the appropriate remedy may vary with the circumstances of the particular case. 386 U.S. at 195. *Vaca's* broad guidelines on apportionment were based primarily on a situation in which the union had sole power under the contract to invoke the higher stages of the grievance procedure. 386 U.S. at 185. That was true in *Vaca*, and it is true in the case at bar. But it was *not* true in *Czosek*.

Since the union's default in *Czosek* did not bar the discharged employees from the higher stages of the grievance process, the union did not cause any loss of wages that resulted from the employees' failure to gain reinstatement through that process. Stated otherwise, the union's default was not a "but for" cause of the failure of the grievance procedure to restore the wrongfully discharged employees to work. Lost wages were not a consequence of the union's breach, nor did they constitute a proper measure of any damage caused by the union. The opinion in *Czosek* thus suggests a remedy wholly appropriate to the facts of the case.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), this Court ruled that discharged employees are entitled to "an appropriate remedy" against both their employer and their union if the employees can prove that their discharges were improper and that their union's breach of its duty of fair representation tainted arbitration decisions that upheld the discharges. 424 U.S. at 572. *Hines* came to this Court on motions to dismiss, before any questions of comparative fault and relative responsibility for damages had been developed through evidence or findings of fact, and so this Court's opinion does not address the apportionment issue.

In his concurring opinion, however, Justice Stewart foresaw that fashioning an appropriate remedy in *Hines* would likely involve an especially sharp question of allocation of fault and damages, and he expressed his considered opinion of the way in which *Vaca's* governing principle should be applied:[9]

> But this is not to say that proof of breach of the Union's representation duty would render Anchor [the employer] potentially liable for backpay accruing between the time of the "tainted" decision by the arbitration committee and a subsequent "untainted" determination that the discharges were, after all, wrongful.
>
> If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. *Liability for the intervening wage loss must fall not on the employer but on the Union.* Such an apportionment of damages is mandated by *Vaca's* holding that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance

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[9]Justice Stewart concurred fully in this Court's opinions in both *Vaca* and *Czosek*. In the absence of any indication to the contrary, it may be assumed that Justice Stewart considered his *Hines* concurrence to be consistent with both prior opinions.

> should not be charged to the employer." 386 U.S. at 197-198. To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement.

424 U.S. at 572-73 (emphasis added).

The case at bar presents precisely the situation envisioned in Justice Stewart's concurrence, except that here the Union behaved even more reprehensibly: having sole control over access to arbitration, it failed maliciously, recklessly, or in callous disregard of Bowen's rights to give Bowen the chance to have his discharge arbitrated. Since Bowen's case was never arbitrated, his discharge remained "rightful" as a matter of contractual procedure until judgment was entered for Bowen in this litigation.

It has been established that Bowen was wrongfully discharged, and that if Bowen's grievance had been arbitrated, he would have been reinstated. The evidence permitted the jury to determine approximately when reinstatement would have occurred. That finding is implicit in the verdict.[10] In the language of *Vaca*, the Postal Service's fault "triggered" Bowen's loss of wages and was the sole cause of that loss *until* the time that arbitration, if pursued, would have put Bowen back to work. But at that point the Union's wrongful failure to demand arbitration became an additional, supervening "but for" cause of Bowen's continued loss of wages. The jury in this case found that the Union had the duty to pursue arbitration in Bowen's case and thus the duty to end unjustified losses that were continuing to accrue.

Clearly, the Union's breach of duty caused Bowen to suffer additional damages. These damages can be measured with fair precision: they are the wages Bowen lost after the time that proper Union action would have resulted in reinstatement.

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[10] *See* note 6, *supra*.

In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court held in a Railway Labor Act case that an award of punitive damages against a union that breaches its duty of fair representation will not further national labor policy. The discharged employees in *Foust* had also been awarded substantial compensatory damages composed principally of lost wages against the union, but that award was not reviewed by this Court. 442 U.S. at 45, n.4. Looking directly to the fundamental goals of national labor policy, this Court premised its decision denying punitive damages on the conviction that the essential purpose of fair representation suits is "to compensate for injuries caused by violations of employees' rights." 442 U.S. at 48-49. The object was to make the injured employee whole, and punitive damages were not perceived to advance this purpose. Four members of this Court declined to impose an absolute prohibition on punitive damages against unions, and while concurring in the result, they would have retained punitive damages among the array of possible relief measures to be applied in appropriate cases to remedy a union's breach of duty. 442 U.S. at 52-61.

Finally, in *Clayton v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 49 U.S.L.W. 4550 (Nos.80-5049, 80-54, May 26, 1981), this Court held that an employee need not, as a precondition to filing *a Vaca v. Sipes* action against both his employer and his union, exhaust internal union appeals procedures that could not reactivate the employee's grievance or grant him the complete relief that he seeks in his judicial action. In so holding, this Court briefly reaffirmed that compensatory damages can be assessed against both the employer and the union in accordance with the governing principle announced in *Vaca*. 49 U.S.L.W. at 4553, n.15.[11]

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[11]The parties in *Clayton* stipulated that the union appeals procedure there could result in an award of backpay from the union to the aggrieved employee in an appropriate case. 49 U.S.L.W. at 4553. It is thus clear that, at least with respect to the union involved in *Clayton*, no policy prohibited an aggrieved employee from recovering lost wages from the union where the union's breach of its duty of fair representation caused the loss of pay.

In all of the foregoing cases, this Court has consistently held that a union may be required to pay that portion of an employee's compensatory damages that it has caused. *Vaca v. Sipes* held that "increases if any in [the employee's] damages caused by the union's refusal to process the grievance should not be charged to the employer." 386 U.S. at 197-98. Where a union's default obviously did not cause a loss of wages, this Court held in *Czosek v. O'Mara* that damages are recoverable from a union to the extent that the union's refusal to handle a grievance adds to the difficulty and expense of collecting damages from the employer. In so holding, this Court confirmed the governing principle that a union is liable for damages that flow from its own conduct. 397 U.S. at 29.

Attempts by circuit and district courts to apply *Vaca* have produced widely divergent and inconsistent rulings on union accountability for lost wages. Some courts have held that only the employer is liable for lost wages.[13] Others have recognized the possibility that a union may be liable for lost wages.[15] And some, like the trial court here, have apportioned lost wages according to an assessment of relative responsibility for the loss.[14] With few

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[13]*E.g., Milstead v. Teamsters, Local 957*, 580 F.2d 232, 236-37 (6th Cir. 1978), *cert. denied*, 50 U.S.L.W. 3278 (No. 81-258, October 13, 1981); *Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276, 281-82 (6th Cir.) (by implication), *cert. denied*, 419 U.S. 868, 997 (1974); *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F. Supp. 290, 295 (D. Wyo. 1974); *Holodnak v. Avco Corp.*, 381 F. Supp. 191, 205 (D. Conn. 1974), *aff'd in part and rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

[15]*E.g., Atwood v. Pacific Maritime Ass'n.*, 432 F. Supp. 491, 495-96 (D. Ore. 1977), *aff'd*, 657 F.2d 1055 (9th Cir. 1981). Some courts have suggested that a union may be held responsible for lost wages if its breach can be shown to have increased the duration of a wrongful discharge, *i.e.*, but for the union's breach, the wage loss would have been demonstrably less. *Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61*, 620 F.2d 439, 443-44 (4th Cir. 1980) (by implication); *Soto Segarra v. Sea-Land Service, Inc.*, 581 F.2d 291, 298 (1st Cir. 1978); *Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

[14]*E.g., Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 718 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979);

exceptions[18], lower courts have simply announced their results, citing *Vaca* , *Czosek*, or *Hines* without analyzing the policies that bear on the apportionment issue.

Justice Stewart's concurrence in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 572-73, speaks directly to the facts at bar. Bowen sustained damages composed of lost wages and benefits. Some of the loss was due to the fault of the Postal Service, which fired him without just cause. Additional damages were caused by the fault of the Union, which breached its duty of fair representation.

The trier of fact that passed on the Union's activities found that the Union refused, maliciously, recklessly, or in callous disregard of Bowen's rights, to demand arbitration, and that arbitration, if requested, would have resulted in Bowen's reinstatement. The trial court, relying on the jury verdict as to the Union, properly apportioned Bowen's lost wages between the two parties at

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Harrison v. United Transportation Union, 530 F.2d 558, 562-63 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *Petersen v. Rath Packing Co.*, 461 F.2d 312, 316 (8th Cir. 1972); *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 492 (4th Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); *Ruzicka v. General Motors Corp.*, 96 L.R.R.M 2822 (E.D. Mich. 1977), *vacated on other grounds and remanded*, 649 F.2d 1207 (6th Cir. 1981), *dismissed*, 519 F. Supp. 893 (E.D. Mich. 1981).

[18]Two exceptions are: *Harrison v. United Transportation Union*, 530 F.2d 558, 562-63 (4th Cir 1975), *cert. denied*, 425 U.S. 958 (1976) (synthesizing *Vaca* and *Czosek* in the manner set forth in this brief, *supra*, and awarding back pay against a union); *Ruzicka v. General Motors Corp.*, 96 L.R.R.M. 2822, 2837 (E.D. Mich. 1977), *vacated on other grounds and remanded*, 649 F.2d 1207 (6th Cir. 1981), *dismissed*, 519 F. Supp. 893 (E.D. Mich. 1981).

Two recent commentators have collected and analyzed the cases applying *Vaca's* mandate to apportion according to fault and have explored the policies underlying the apportionment of lost wages. Linsey, *The Apportionment of Liability for Damages Between Employer and Union in § 301 Actions Involving A Union's Breach of Its Duty of Fair Representation*, 30 Mercer L. Rev. 661 (1979); Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach?*, 1981 Wis. L. Rev. 155. Both endorse Justice Stewart's *Hines* concurrence and the proposition that a union ought to pay compensatory damages composed of wages lost after the time that arbitration, if pursued by the union, would have resulted in reinstatement.

fault, and it correctly assessed against the Union only the increase in damages caused by and flowing from the Union's breach of duty.

The Fourth Circuit, however, flatly held that the Union could not be compelled to pay compensatory damages to Bowen to the extent such damages included lost wages. That is not the law. This Court's opinions require that where a union's breach of its representational duty has caused an employee to suffer increased or additional damages, and where, as here, both the fact of the breach and the amount of the increased or additional damages have been determined, the Union must respond in the amount of such damages. Because the ruling of the Fourth Circuit contradicts principles announced in controlling decisions of this Court, that ruling must be reversed.

(b) Our National Labor Policy of Encouraging Industrial Self-Government and Peaceful Settlement of Disputes through Arbitration Requires that a Union Pay the Portion of Lost Wages Caused by the Union's Breach of its Duty of Fair Representation.

A union's duty of fair representation and an employee's right to enforce that duty are crucial to maintaining our system of collective bargaining and industrial self-government. When a union breaches its duty, a compensatory award should be imposed that requires the union to pay the wage loss caused by its breach. Such an award will implement national labor policy by compensating the injured employee, enforcing the expectations of the parties to the collective bargaining agreement, and strengthening the collective process by encouraging in an appropriate manner future union adherence to its duty.

Our long-standing national labor policy of encouraging industrial self-government and the peaceful resolution of industrial disputes is embodied in the collective bargaining process. The vitality of a collective bargaining agreement depends, in turn, on a properly functioning grievance and arbitration mechanism. Through this mechanism, the parties settle disputes about the administration of the agreement and engage in ad hoc bargaining

to interpret it.[16] As this Court has long recognized, binding arbitration of disputes as the final step of the grievance process is the *quid pro quo* for the most valuable guarantee of industrial peace, the no-strike clause.[17] On the efficacy of these two elements—binding arbitration and the no-strike clause—depends the attainment of national labor policy.

Congress enacted § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, to protect the fundamental process for effectuating national labor policy. As President Truman clearly perceived in an address that is quoted in the legislative history of § 301, it had become necessary to find a means of insuring responsible behavior by all parties to the collective bargaining process:

> *We shall have to find methods* not only of peaceful negotiations of labor contracts, but also *of insuring industrial peace for the lifetime of such contracts.* Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, *there must be responsibility and integrity on both sides in carrying them out.*[18]

The congressional solution was § 301, which guaranteed the enforceability of collective bargaining contracts.

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[16]Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 742 (1973). Professor Feller's seminal article, which was cited by this Court in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 46 n.8 (1979), significantly illuminates the origins and implications of national labor policy with particular reference to the law governing the duty of fair representation.

[17]*Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960); *see Feller, supra* note 16, at 755-57.

[18]S. Rep. No. 105, 80th Cong., 1st Sess. 15-16 (1947) (emphasis added), *reprinted in Legislative History of the Labor Management Relations Act, 1947*, printed for the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Cong., 2d Sess., at 422 (1974) (hereinafter "*Legislative History*").

This Court has recognized § 301 as a source of substantive law that "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements. . . ." *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957). In *Linc. ln Mills*, and later in the Steelworkers Trilogy,[19] this Court firmly established the central position of private arbitration by parties to a collective bargaining agreement as the best means to promote peaceful settlement of labor disputes, and thereby to advance national labor policy. In these seminal cases, this Court bolstered the collective bargaining process by placing "consistent emphasis upon the congressional policy to promote peaceful settlement of labor disputes through arbitration." *The Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970).

But the enforcement of collective bargaining agreements requires more than smoothly operating arbitration machinery; it also requires that individual workers be able fairly to invoke the process and to rely upon the integrity of its results. As this Court recognized in *Vaca v. Sipes*, the right of access to arbitration is often controlled, as a practical or contractual matter, by the workers' exclusive bargaining representative, their union. 386 U.S. at 191-92. Swift and effective resolution of labor grievances through contractual means thus depends largely on the good faith diligence of the union.

The mandate of § 301 to insure enforceable collective contracts has therefore led to the development, previously traced in this brief, of the federal law of fair representation. By imposing this duty on unions, this Court has sought to assure that unions are properly motivated to make the system of negotiating and administering collective bargaining agreements work.

As this Court observed in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 48-49, an injured employee's action for breach of his union's duty of fair representation is designed in the first instance "to compensate for injuries

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[19] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

caused by violations of employees' rights." This compensatory purpose is accomplished by assessing against each party who has caused injury to the employee those damages caused by and flowing from the party's fault. *Vaca v. Sipes*, 386 U.S. at 197. Not only is the injured employee thereby made whole, but the purpose that led to the passage of § 301 and the creation of the duty of fair representation is also fulfilled: exposure to compensatory damage awards creates an incentive for the proper union behavior that is essential to the continued functioning of the negotiated grievance process. *See Vaca v. Sipes*, 386 U.S at 182, 187. The legislative history of § 301 articulates the risk that is run if adequate incentives for proper union participation in the collective process are lacking:

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.[80]

If a union can breach its duty of fair representation with "relative impunity," then the agreement to resolve disputes peacefully in arbitration is abrogated and its usefulness is destroyed as effectively as if the union or the employer had simply repudiated the process.

In the case at bar, this Court must fashion a compensatory award against the Union that facilitates collective bargaining by insuring future Union adherence to its duty of fair representation. Requiring the Union to pay its fair portion of Bowen's lost wages will accomplish this. In a discharge case such as this, and, indeed, in most industrial discipline cases, the most significant injury inflicted on the employee is loss of the opportunity to

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[80]S. Rep. No. 105, 80th Cong., 1st Sess. 16 (1947) (emphasis added), *reprinted in Legislative History*, at 422.

work. If that opportunity is wrongfully taken, the wages thereby lost are the obvious and appropriate measure of the injury. Where a union's breach of duty of fair representation causes an unjust discharge to remain in effect that would have been overturned had the union fulfilled its duty, the principal injury the union inflicts is continued loss of the chance to work. The wages thereby lost are the only measure of the injury in most cases. Only a damage award against the union composed of these lost wages accurately measures the scope and effect of the union's fault. Only such an award applies the appropriate incentive for proper union action in the future.

Moreover, apportionment of Bowen's lost wages according to the fault of the parties will implement the bargain the parties struck and thus fulfill the originating purpose of § 301. In disciplinary situations, the essence of the grievance and arbitration procedure is that the employer first acts and the union or the disciplined employee then grieves. As long as the contractual grievance and arbitration procedure is properly available and fairly operating, the employer's action can be reviewed and effectively challenged in a calm and deliberate process that culminates in evaluation by a neutral arbitrator. An unjustly disciplined employee thus has a chance for reprieve. In return for agreeing to establish and abide by this procedure, the employer gains a two-fold benefit: first, assurance of industrial peace, and second, a private forum in which the employer may defend its management judgment, and in which wrongful discipline will be quickly discovered and liability, if any, for back wages will be promptly and finally fixed. *See United Parcel Service v. Mitchell*, 49 U.S.L.W. 4378, 4380 (No. 80-169, April 20, 1981). If the union defaults in its duty, however, the employee's wage loss continues beyond the time that arbitration which the union should have invoked would have curtailed the loss.

If the employer must bear the additional loss caused by the union's breach of duty, his legitimate expectations arising out of the collective bargaining agreement are frustrated. If the employer justly avoids paying the union's share and the union escapes liability for losses it has caused, the injured employee is not made whole, and a fundamental purpose of fair representation litigation is frustrated. In order that contractual expectations may be

enforced and that the injured employee may be compensated fully for the union's wrongdoing, the union must bear its share of the fault in actual compensatory dollars.

Commentators who have considered this question have concluded that requiring a union to bear its proportionate share of back wage liability is the only solution that is consistent with national labor policy. In particular, Professor David E. Feller, after a searching examination of the origins and development of national labor policy, has concluded that a union should pay compensatory damages composed of back pay lost through the union's breach of its duty in order to fulfill the basic expectations of the parties to collective bargaining agreements and strengthen the fundamental bases upon which the collective bargaining process works.[21]

Other commentators have identified a variety of undesirable, but likely, effects of a rule that places upon the employer the duty to pay for the union's breach. If the employer is left to bear all losses from breakdowns in the mechanism, regardless of the proportionate fault of both the union and the employer in causing the damage, the integrity of the grievance process will necessarily suffer. Ultimately, the employer will be less willing to agree to such procedures, if by so doing the employer alone bears the risk of the union's failure to use the agreed procedure to resolve disputes. The result will be the loss of the widely recognized benefits to be derived from private dispute resolution procedures.[22]

When employers agree to binding arbitration of disputes, they do not bargain for, and therefore should not be subjected to, solitary, continuing, or indefinite liability. Unless the union bears responsibility for the additional loss in wages that its breach of duty causes, the employer will have no effective means of protecting itself from unfair and uncertain liability short of extracting

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[21]Feller, *supra* note 16, at 772-74, 818-21. Professor Feller took as his starting point the law governing the duty of fair representation because he perceived that it involves the essence of the system of collective bargaining.

[22]Comment, *supra* note 15, at 177-80.

a broad indemnity provision from the union.[83] This Court should not compel labor and management to arrive at a generalized contractual apportionment of damages when the courts (and the NLRB) are much better equipped to carry out the express command of *Vaca v. Sipes* and divide damages based upon the facts of individual cases. 386 U.S. at 196. Moreover, if employers must constantly fear having to pay the bill for a union's wrongful failure to represent employees, employers will be sorely tempted to meddle in internal union affairs in an effort at self-protection.[84]

It is no answer to state that, because wages are payable initially only by the employer, they constitute a proper measure only of the damages caused by the employer's breach of contract. Lost wages have traditionally been deemed a proper measure for giving a wrongfully discharged employee the benefit of the bargain that he has lost through breach of contract. But lost wages have *also* traditionally constituted a measure of the damages caused by tortious breaches of various duties that cause an injured party to lose wages. The question is not, as the Fourth Circuit would have it, whose obligation are wages initially. Rather, the issue is what sort of damage has the wrongdoer *caused* to the injured party. If the damage is loss of compensation for work that would have been performed but for the wrong perpetrated, the proper measure of that damage is the wages that were lost.

The Union cannot seriously contend that being required to pay for the damage it has caused is unfair. Senator Smith, in the debate on § 301, quoted Justice Brandeis' eloquent and telling analysis of why, on the contrary, unions ought to *welcome* accountability for their actions. In 1902 Justice Brandeis observed:

> The unions should take the position squarely that they are amenable to law, *prepared to take the consequences if they transgress*, and thus show that

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[83]Edwards, *Employer's Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 Lab. L. J. 686, 691-92 (CCH 1976); Comment, *supra* note 15, at 179. This sort of indemnification is precisely the reverse of that visualized by this Court in *Vaca v. Sipes*, 386 U.S. at 197.

[84]Linsey, *supra* note 15, at 679.

> they are in full sympathy with the spirit of our people, whose political system rests upon the proposition that this is a government of law, and not of men.
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> I can conceive of no expenditure of money by a union which could bring so large a return as the *payment of compensation for some wrong actually committed by it. Any such payment would go far in curbing the officers and members of the union from future transgressions of the law, and it would, above all, establish the position of the union as a responsible agent in the community, ready to abide by the law. This would be of immense advantage to the union* in all of its operations.[88]

Most simply put, the Union *ought* bear its proportionate share of the consequences where its fault has caused damage because the duty of fair representation, arising from the heart of § 301, carries with it the duty to be "a responsible agent in the community" . . . "prepared to take the consequences" of a transgression.

As Justice Brandeis recognized, the ancient proposition that a wrongdoer should bear the consequences of his acts is fundamental to our jurisprudence. It both compensates the injured party and deters the wrongdoer. Shifting to another the consequences of one party's wrongdoing may provide compensation, but it will have none of the desired deterrent effect (unless the party to whom the burden is shifted can somehow redirect it to its rightful bearer).[89] Indeed, such a shifting may encourage the wrongdoer to take risks that are even more costly—to others.

The interrelationship between an employer's wrongful discharge and a union's breach of its statutory duty of fair representation implicates unique and complex concerns of national labor policy. This Court has recognized that an exclusive bargaining

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[88]93 Cong. Rec. 4282 (1947) (remarks of Sen. Smith; emphasis added), *reprinted in Legislative History*, at 1146.

[89]*See* text at note 23, *supra*.

representative must have discretion in administering the grievance and arbitration procedure if the procedure is to remain effective over the long haul. *Vaca v. Sipes*, 386 U.S. at 191-92. But *Vaca* gives unions the necessary and appropriate latitude through its definition of a union's duty. By holding unions liable only for arbitrary, discriminatory, or bad faith behavior, this Court has already given unions sufficiently wide discretion to balance their duties to the entire bargaining unit with their duties to individuals within the unit. Given this threshold latitude, nothing inherent in a union's exercise of its duty of fair representation alters the fundamental calculus of restitution.[27]

The considerations of national labor policy which preclude punitive awards against unions do not apply where compensation for actual losses is involved. This Court's decision in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 48-49, recognized that the purpose underlying fair representation actions is fundamentally compensatory. If a full compensatory award is available, punitive damages contribute nothing toward achieving that purpose. In *Foust*, this Court also expressed concern that punitive awards of unforeseeable size, perhaps imposed to punish an unpopular defendant, could impair the financial stability of a union. Unwarranted depletion of a union's treasury because of a breach of duty involving a single employee could undermine the union's effectiveness as the agent for the entire bargaining unit. Moreover, it was thought that a union's fear of unpredictable punitive awards might limit the union's exercise of discretion in handling grievances. This Court concluded that confining recoveries in unfair representation suits to full compensation of the injured employee would properly balance individual and collective interests while adequately protecting union funds. 442 U.S. at 48-52.

Foust is predicated upon the availability of a full compensatory award to an injured employee. If a union is not held liable for the damages it causes, that compensatory premise is destroyed. Moreover, it cannot be assumed that imposition of compensatory, as opposed to punitive, liability on a union will unjustifiably drain the union treasury. Compensatory damages,

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[27]Comment, *supra* note 15, at 177.

unlike punitive damages, are predictable. As will be discussed in the following section of this brief, the NLRB for many years has held unions accountable for breaches of the duty of fair representation by imposing on them compensatory damage awards composed of back wages. This experience has neither bankrupted unions nor chilled the union discretion necessary to effective collective activity.

Indeed, holding the Union responsible here is necessary to *insure* effective union representation of employees. It is anathema to our jurisprudential system to suggest that an individual's right to recover compensation for an adjudicated wrong is outweighed by the plea of a defendant wrongdoer for protection of its treasury.

Most importantly, however, the effectiveness of the entire structure of national labor policy—which is designed to foster industrial peace through encouraging and enforcing collective bargaining agreements—requires that unions be held responsible for their acts. In the context of the Union's breach of its duty of fair representation here, responsibility can only be enforced by imposing on the Union compensatory damage liability for the wages Bowen lost because of the Union's breach.

Stability in private dispute resolution has taken years to develop. Its development has been possible only because advocates of the labor arbitration process have long enjoyed the fullest support of the Congress and this Court. But maintenance of efficient and reliable mechanisms for private dispute resolution requires unions that are properly motivated to make the system work. Unions that improperly and illegally interrupt the process must be held accountable for the losses they have caused, both to make whole the injured employee and to encourage the responsible union behavior that is essential to continued functioning of negotiated dispute resolution procedures. As Senator Taft observed during the debate over § 301:

> If there is one subject upon which every unprejudiced person is agreed, it is that unions must be made responsible for their acts, that collective bargaining cannot continue to be an important factor in our labor relations unless both parties are bound by their contracts. . . .

> [T]he purpose of this provision is to induce [unions] to live up to their contracts . . . .[28]

In the instant case this Court can fortify the collective bargaining process, achieve justice among the parties before it, and provide guidance for the resolution of similar future disputes by requiring this Union to bear the portion of Bowen's loss of wages that was caused by the Union's breach of its duty of fair representation. Stated generally, the rule should be that damages composed of lost earnings in a fair representation case should be apportioned between the union and the employer in a manner that is based upon a properly functioning grievance and arbitration procedure. The parties agreed to use that procedure, and Congress, through § 301, has made that collective agreement enforceable. This Court, through its apportionment rule, can both effectuate the agreement of the parties and enforce their congressionally-mandated responsibility to make proper use of agreed-upon procedures for the private resolution of industrial disputes. Manifestly, this important goal of national labor policy is not furthered by exonerating a guilty party—the Union in this case—from damages that it has demonstrably caused to an employee whose interests it was charged by law to protect.

(c) National Labor Policy As Interpreted and Applied by the National Labor Relations Board Requires that a Union Be Held Liable for Wages Lost Because of the Union's Breach of Its Duty of Fair Representation.

Congress established the NLRB as the federal agency primarily responsible for the interpretation and application of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § § 141 *et seq*. Among the several findings which led Congress to create the NLRB was that:

> Experience has proved that protection by law of the right of employees to . . .bargain collectively safeguards commerce from injury, impairment, or inter-

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[28] 93 Cong. Rec. A3043 (1947) (remarks of Sen. Taft; emphasis added), *reprinted in Legislative History*, at 1626.

> ruption, and promotes the flow of commerce . . . *by encouraging practices fundamental to the friendly adjustment of industrial disputes* . . . .

29 U.S.C. § 151 (emphasis added). Congress therefore empowered the NLRB

> to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

29 U.S.C. § 160(a).

Having established the right of employees to join, and to bargain collectively through, a labor organization, Congress sought to encourage "practices fundamental" to the peaceful, private resolution of disputes by declaring that the NLRB should find unfair labor practices where a labor organization or its agents restrain employees in the exercise of their rights, or discriminate or cause discrimination to encourage or discourage membership. 29 U.S.C. § 158(b)(1) and (2). For the same reason, the labor organization must bargain collectively in good faith. 29 U.S.C. § 158(b)(3).

Pursuant to its Congressional mandate, for the past twenty years the NLRB has consistently found that a union's breach of its duty of fair representation may violate § § 158(b)(1), 158(b)(2) or 158(b)(3), depending on the facts of a particular case.[29] In *Vaca*

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[29] *Miranda Fuel Co.*, 140 N.L.R.B. 181, 51 L.R.R.M. 1584, 1587 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); *Metal Workers Union (Hughes Tool Co.)*, 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964); *Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n, Inc.)*, 148 N.L.R.B. 897, 57 L.R.R.M 1083 (1964), *enforced*, 386 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Rubber Workers Union (Business League of Gadsden)*, 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964), *enforced*, 368 F.2d 12 (5th Cir 1966), *cert. denied*, 389 U.S. 837 (1967); *Red Ball Motor Freight, Inc.*, 157 N.L.R.B. 1237, 61 L.R.R.M. 1522 (1966), *enforced sub. nom. Truck Drivers and Helpers, Local 568 v. NLRB*, 379 F.2d 137 (D.C.Cir. 1967); *Olympic Steamship Co.*, 233 N.L.R.B. 1178, 97 L.R.R.M. 1276 (1977);

v. Sipes, 386 U.S. at 176-86, this Court reviewed the NLRB's activity in the area and assumed it to be proper. But this Court refused to find exclusive jurisdiction in the NLRB because of concern that the NLRB might not be willing or able in every case "to remedy a union's breach of duty." 386 U.S. at 183. The fact that the NLRB was applying judicially developed doctrine in this area, and thus no danger of conflicting rules of substantive law existed, was a substantial factor in the decision to deny exclusive jurisdiction to the NLRB. 386 U.S. at 180-81. *Vaca* did not address the nature of NLRB remedies for breach of the duty of fair representation.

When the NLRB has discovered a breach of a union's duty of fair representation, it has found authority to award appropriate compensatory relief embodied in Section 10(c) of the National Labor Relations Act, which provides in part:

> [W]here an order directs reinstatement of an employee, *back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him* . . . .

29 U.S.C. § 160(c) (emphasis added). Guided by this congressional articulation of national labor policy, the NLRB has not hesitated to award compensatory damages against a union composed of wages lost because of the union's breach of the duty of fair representation. For example:

(1) In *IBEW, Local 2088 (Federal Electric Corp.)*, 218 N.L.R.B. 396, 89 L.R.R.M. 1590 (1975), the NLRB ordered the union to make employees whole for all lost earnings (less those for which the employer was responsible) that arose from the union's failure to process grievances.

(2) In *Steelworkers (InterRoyal Corp.)*, 223 N.L.R.B.

Teamsters, Local 559, 257 N.L.R.B. No. 6, 107 L.R.R.M. 1453 (July 21, 1981).

A majority of the courts of appeals have concluded that breach of the duty of fair representation is an unfair labor practice. *United Parcel Service v. Mitchell*, 49 U.S.L.W. 4378, 4381, n.3 (No. 80-169, April 20, 1981) (Stewart, J., concurring) (citing cases).

1184, 92 L.R.R.M. 1108 (1976), a union was ordered to make an employee whole for back-pay losses suffered as a result of the union's Section 8(b)(1)(A) violation.

(3) In *United States Postal Service*, 240 N.L.R.B. 1198, 100 L.R.R.M. 1371 (1979), the Board adopted the Administrative Law Judge's recommendation and made a postal worker's union primarily liable, and the Postal Service secondarily liable, for any loss of earnings suffered by an employee because of the union's breach of its duty of fair representation. On appeal, the NLRB order was enforced as to the union but set aside as to the Postal Service. *NLRB v. American Postal Workers Union*, 618 F.2d 1249 (8th Cir. 1980). The union, therefore, bore the entire back pay responsibility.[80]

In 1977 NLRB General Counsel John S. Irving articulated Board policy on the appropriate remedies for a union's breach of the duty of fair representation:

> Generally, in Section 8(b)(1)(A) cases involving a union's unlawful refusal to process a grievance, there are no means for the union to require that the grievance be arbitrated since it has become time barred under the contract. Thus, the general remedy is to require the union to make whole the grievant for any loss of wages from the time the union unlawfully refused to process the grievance, until the grievant obtains substantially equivalent employment. *Port Drum Co.*, 180 NLRB 590, 73 LRRM 1068.[81]

The remedial approach adopted by the NLRB precisely implements this Court's prescription in *Vaca v. Sipes* to apportion

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[80]Other representative cases in which the NLRB has imposed back pay liability on a union in a fair representation context are: *Operating Engineers, Local 139*, 256 N.L.R.B. No. 89, 107 L.R.R.M. 1290 (June 12, 1981); *Electrical Workers (Westinghouse Electric Corp.)*, 254 N.L.R.B. No. 161, 106 L.R.R.M. 1267 (March 9, 1981); *Auto Workers, Local 417 (Falcon Industries, Inc.)*, 245 N.L.R.B. 527, 102 L.R.R.M. 1466 (1979).

[81]*Report of the General Counsel on Case Handling Developments at NLRB, reprinted in* BNA Labor Relations Yearbook-1977, 250, 256 (1978).

damages according to fault. The NLRB's powers have long been characterized as remedial rather than punitive, *see Local 60, United Brotherhood of Carpenters and Joiners v. NLRB*, 365 U.S. 651 (1961), and thus their application to redress breaches of the duty of fair representation is especially appropriate in light of the compensatory purpose that underlies an action for breach of the duty. As a general matter, this Court has consistently given special respect to the Board's choice of remedy because of the NLRB's knowledge, experience and expertise in the labor relations arena. *E.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

The NLRB's practice of awarding back pay against unions has become an established means of preventing unfair labor practices, including breaches of the duty of fair representation. If this Court should deny Bowen similar relief, an extraordinary anomaly would result. *Vaca's* denial of exclusive Board jurisdiction over actions such as this rests on the Board's supposed inability to protect and compensate injured employees fully, and on the proposition that courts of law are peculiarly fitted for this task. Since the decision in *Vaca*, the Board has exercised its admitted expertise in interpreting national labor policy to impose precisely the remedy for which Bowen argues here. If this Court rejects Bowen's position, the Board, and not the courts, will have proved in this instance to be the forum possessing the wider and more flexible array of remedies for employees injured by a union's breach of duty. At best, such a result creates a conflict in substantive remedies that will lead to widely disparate results depending solely on the selection of forum. At worst, it calls into question the principal holding in *Vaca*.

A decision of this Court that a compensatory award against a union cannot include lost wages could have another untoward effect. Congress has mandated that the power of the NLRB to prevent unfair labor practices shall not be affected by any other means of adjustment, legal or otherwise. 29 U.S.C § 160(a). If this Court prohibits courts from making compensatory back pay awards against unions, it would at the least cast a shadow over the NLRB's authority to do otherwise, thus raising potentially difficult problems regarding the scope and interpretation of the NLRB's powers.

The federal agency normally charged with applying and enforcing national labor policy clearly does not believe the collective bargaining process is threatened by the award of compensatory damages composed of lost wages against a union that causes the loss by breach of the duty of fair representation. Moreover, no indication exists that the NLRB's imposition of such liability has damaged the ability of unions to fulfill their duties as collective bargaining agents or has threatened unions with bankruptcy. On the contrary, the NLRB obviously regards such liability as an appropriate remedy for enforcing the fair representation duty. Without the availability of back pay awards against each party to the collective bargaining process whose acts have caused a loss of wages, the NLRB would be less able to encourage "practices fundamental" to successful private dispute resolution.

Congressional policy must be the source of both an NLRB remedy for breach of a union's duty of fair representation and the remedies that are appropriate under § 301 to enforce that duty in the courts. In the consistent and long-standing practice of the NLRB concerning the issue at bar, this Court should find confirmation of the propriety and the wisdom of requiring the Union to bear that portion of Bowen's loss of wages which the Union's breach of the duty of fair representation caused.

(d) If the Union is Excused from Paying Any Share of Lost Wages, Petitioner Remains Entitled to a Full Compensatory Award from the Postal Service, and this Court Should Exercise Its Supervisory Powers to Correct the Fourth Circuit's Unjust and Erroneous Reduction of Petitioner's Stipulated and Uncontested Award of Compensatory Damages.

Vaca v. Sipes empowered courts to do complete justice in a single proceeding for an employee who has been injured by both his employer's unjust discipline and his union's breach of the duty of fair representation. 386 U.S. at 187, 197. *International Brotherhood of Electrical Workers v. Foust* established beyond peradventure that an unfair representation action is designed principally to make the injured employee whole. 442 U.S. at 48-49. The Fourth Circuit, laboring under mistaken impressions about the nature and posture of the case before it and the scope and

proper application of its own powers, erroneously and summarily voided the bulk of Bowen's compensatory award. If this Court declines to hold the Union accountable for the wages Bowen lost after the time that arbitration, if pursued, would have resulted in reinstatement, then Bowen must be permitted to receive his full compensatory award from the Postal Service.

The district court found, based on the jury's determinations and the stipulation of the parties, that Bowen lost a total of $52,954.12 in wages and fringe benefits, and it awarded him that sum. The amount of these damages has never been contested in this litigation. Neither the Union nor the Postal Service asked the Fourth Circuit to alter the amount of this award if liability were affirmed.

The February 23, 1981, opinion of the Fourth Circuit reversed the district court on but a single point: the inclusion of part of Bowen's lost wages in the damages to be paid by the Union. The Fourth Circuit affirmed Bowen's judgment for $52,954.12 and recited that Bowen was "entitled . . .to reimbursement for his resulting loss of earnings and fringe benefits . . .," which amounted, as the Fourth Circuit recognized, to $52,954.12. (Pet. A4-A5.) The effect of the February 23 ruling on the Union's amenability to an assessment of damages was to reapportion liability for Bowen's undisputed damages entirely to the Postal Service—not to reduce the amount of those damages. Indeed, the Postal Service filed a petition for rehearing and suggestion for rehearing *en banc* expressly observing that, as a result of the exoneration of the Union, the Postal Service would now be responsible for paying all of the damages that had been awarded to Bowen. There was no hint from any party that the allocation question placed in jeopardy any part of Bowen's compensatory award.

When, on July 7, 1981, the Fourth Circuit republished its earlier final opinion, it added footnote 6:

> [6]We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection, we note that no appeal was entered by the plaintiff from the judgment against the Service in the amount of $22,954.12.

(Pet. A5.) This footnote altered drastically the law of the case and summarily eliminated $30,000 of the undisputed damages that were awarded to Bowen in the district court and affirmed by the Fourth Circuit on February 23. The only reason given for this action is the reference to Bowen's failure to appeal a "judgment against the [Postal] Service in the amount of $22,954.12." The rewriting panel apparently believed that a separate judgment had been rendered for Bowen against the Postal Service in this lower amount, and that this judgment could not be altered by the court of appeals because Bowen should have appealed himself, but did not.

The court of appeals' perception of this case, and of its power to make Bowen whole, is manifestly wrong. First, Bowen's *judgment* was for $52,954.12. (Pet. A12, A15, A21-A22.) The allocation of this amount between the Union and the Postal Service was purely a function of the district court's interpretation of the law governing union liability for damages in fair representation cases, an interpretation that the Fourth Circuit reversed. (Pet. A12, A17-A18, A22.) The division, according to fault, of responsibility for paying Bowen's damages did not affect the total amount of Bowen's judgment. Nor did it release either respondent from bearing its just liability in case an appellate court disagreed with the legal basis upon which responsibility for paying the damages was divided. By *affirming* on February 23, 1981, the judgment of the district court in all respects save on the purely legal issue, the Fourth Circuit made Bowen's full compensatory award final.

Second, as a legal and practical matter, Bowen was entirely successful on all compensatory issues at the trial level. The verdict after trial included a full award of petitioner's lost wages and benefits, plus punitive damages, attorneys' fees, and costs. The award of punitive damages, of course, could not stand under the law as it has developed.[88] Once the issue of punitive damages was out of the case, Bowen had absolutely no reason to appeal. The heart of the matter is that Bowen was awarded reinstatement and his full compensatory damages; which party paid

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[88] *See* note 8, *supra*.

these damages, and in what proportion, were not Bowen's concern. He could add nothing to the discussion on appeal that the parties truly affected could not argue vigorously for themselves.

If the Fourth Circuit panel meant to suggest in footnote 6 that Bowen failed to protect against any foreseeable possibility that the total amount of his compensatory award was in jeopardy on the appeal, such a suggestion simply is not accurate. Bowen responded to all substantive challenges to the validity of his award. Since neither the Union nor the Postal Service sought to reduce the total amount of the award, Bowen had only to seek affirmation of the judgment in his favor—a goal that he pursued in all appropriate ways.

No rule of law and no rational principle of justice or judicial economy requires a successful plaintiff to file a cross-appeal in a case such as this where the plaintiff has proved the defendants' fault and been awarded full compensation. The error in the Fourth Circuit's contrary ruling is made clear by attempting to visualize a situation in which, under footnote 6, an employee would "win" and would not have to appeal. In order to avoid filing an appeal in a situation where any dispute existed between the employer and the union about liability for compensatory damages, the employee would have to win full awards of *all* of his damages against *both* defendants *simultaneously*. But such an award of joint and several liability has long been ruled impermissible in these cases absent rare circumstances that were not present in the case at bar. *Vaca v. Sipes*, 386 U.S. at 197 n.18. Unless a case fell into the narrow class for which joint and several liability is appropriate, under the Fourth Circuit's rule no plaintiff employee could *ever* fully prevail in the trial court; all plaintiffs would always have to appeal. The illogic of such a rule is manifest.

As a practical and strategic matter, the Fourth Circuit's requirement that a plaintiff who prevails must nevertheless appeal puts the successful plaintiff in the absolutely untenable position of having to defend the trial court's judgment on the apportionment issue on the one hand while attacking it on the other. Requiring a successful plaintiff to thus "acknowledge error" in the trial court judgment destroys any ability to resist the appeals of the other parties. At best, it will generate only a superfluous complication

of the posture of these cases on appeal and produce a confusing multiplicity of appeals and briefs that will serve no useful function in aid of the appellate process.

Finally, and most importantly, the Fourth Circuit's footnote 6 is also wrongheaded in its application of appellate powers to the hybrid form of litigation created by *Vaca's* injunction that the union and the employer should be sued in a single action. Clearly, the Fourth Circuit had jurisdiction over the question of apportionment of damages, because both respondents here noted appeals. As the Solicitor General recognized in his Memorandum for the Federal Respondent in Opposition to Bowen's petition in this Court, at 6, the court of appeals possessed power under 28 U.S.C. § 2106 to award Bowen all appropriate relief. *Vaca* and *Foust* define the relief appropriate in this case—full compensation of the injured employee in a single action.

The Fourth Circuit, however, having misperceived the existence of a discrete judgment against the Postal Service, mistakenly separated what are in fact complementary and interconnected aspects of the court's unitary obligation, under *Vaca*, to make an injured employee whole. In so doing, the Fourth Circuit divested itself of the remedial power it possesses and that *Vaca* commands it to exercise on behalf of an employee wrongfully discharged by his employer and wrongfully deprived of his contractual remedy by his union's breach of its duty of fair representation. A principal basis for *Vaca's* rejection of exclusive jurisdiction in the NLRB over these actions was this Court's conviction that the remedial powers traditionally exercised by courts of law were required to fashion full remedies in these cases. 386 U.S. at 181-83, 187-88. If the Fourth Circuit's ruling is allowed to stand, grave injury will have been caused to Bowen, and the utility of the courts as a forum in which a wronged employee can obtain full relief will have been lessened.

In light of its ruling on the law of apportionment of damages, the Fourth Circuit's refusal to remand this case for reapportionment by the trial court constituted a substantial injustice to Bowen, for he thereby lost the greater portion of his uncontested compensatory award. Moreover, because of a mischaracterization of the nature of the judgment in the trial court and a misunder-

standing of its own powers to fashion appropriate relief, the Fourth Circuit's action defeated the essential purpose of fair representation litigation.

If this Court declines to require the Union to bear a portion of Bowen's lost wages, the Postal Service cannot be allowed to escape full liability under the law of the case. Since the total amount of Bowen's lost compensation was stipulated and has never been contested in this litigation, that amount could simply be entered as the appropriate award against the Postal Service. In the alternative, the case could be remanded to the trial court, which was the trier of fact as to the Postal Service, for appropriate reapportionment in accordance with the law as determined by this Court.

CONCLUSION

The Fourth Circuit's ruling absolving the Union from paying compensatory damages composed of wages lost because of the Union's fault is contrary to principles announced in prior decisions of this Court, conflicts with national labor policy, undermines the collective bargaining process, and contradicts the long-standing remedial practice of the National Labor Relations Board. For these reasons it must be reversed.

In the alternative, if this Court permits the Fourth Circuit's ruling with respect to the Union to stand, the Postal Service must be required to reimburse Bowen for all wages he lost after his unjust discharge. In the interests of fairness and justice, and to protect the power of the courts to render full relief in cases of this nature, this Court should exercise its supervisory powers and either enter judgment for Bowen or remand the case for entry of judgment in the full amount of the compensatory damages to which all parties and all courts have agreed he is entitled.

Respectfully submitted,

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Respondent's Brief

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No. 81-525

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES V. BOWEN, PETITIONER

v.

UNITED STATES POSTAL SERVICE and
AMERICAN POSTAL WORKERS UNION, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether, in an action by an employee against his employer for wrongful discharge and against his union for breaching its duty of fair representation by failing properly to process his grievance based on the wrongful discharge, the district court erred in assessing against the union damages for back wages and benefits for the period during which the employee would have been reinstated if the union had properly processed his grievance.

2. Whether, if such damages for back wages and benefits are not assessable against the union, they may be ordered recoverable from the employer on appeal notwithstanding the facts that the district court assessed them only against the union and that the employee did not appeal from that judgment.

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 642 F.2d 79. The opinion of the district court (Pet. App. A14-A20) is reported at 470 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals, as amended, was entered on July 7, 1981, and a petition for rehearing was denied on September 15, 1981. The petition for a writ of certiorari was filed on September 15, 1981, and was granted on December 7, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

39 U.S.C. 1208(b) provides:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

STATEMENT

1. In 1976, petitioner was employed by respondent United States Postal Service and was represented for the purpose of collective bargaining by respondent American Postal Workers Union, AFL-CIO (APWU) (Pet. App. A14). The collective bargaining agreement between the Postal Service and the Union provided that petitioner could be discharged only for just cause (*id.* at A15).

In February 1976, the Postal Service suspended petitioner because of an incident involving a scuffle with another employee. On March 30, 1976, following an investigation into the incident, petitioner was discharged from his Postal Service employment (Pet. Br. 4-5; Pet. App. A14). Petitioner then filed a grievance with the APWU local, alleging that his discharge was without just cause and therefore violative of the collective bargaining agreement. The APWU local eventually forwarded the matter to the Union's national office, which declined to refer petitioner's grievance to arbitration (Pet. Br. 5-6). Accordingly, in December 1976, petitioner brought this action under 39 U.S.C. 1208(b) in the United States

District Court for the Western District of Virginia.[1] Petitioner alleged that the Union had breached its duty of fair representation and that the Postal Service had wrongfully discharged him without just cause (Pet. App. A2-A4).

The case was tried before a jury, which served in an advisory capacity as to matters involving the Postal Service (Pet. App. A4, A18). The Postal Service contested the allegation that petitioner's discharge was wrongful, and the Union argued that it had not breached its duty to represent petitioner fairly. Nevertheless, the jury found against both respondents and rendered a special verdict responding to eight questions propounded by the district court (*id.* at A21-A22). Specifically, the jury found that the Union had breached its duty of fair representation to petitioner in the handling of his grievance, that the Postal Service had discharged petitioner without just cause, that petitioner was entitled to $47,000 in compensatory damages ($30,000 of which the jury attributed to the Union and

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[1] 39 U.S.C. 1208(b) is the analogue of Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185, for suits involving the Postal Service. The lower courts have recognized that the law developed under Section 301 is generally applicable to Postal Service suits arising under 39 U.S.C. 1208(b). See, *e.g.*, *National Post Office Mail Handlers Local No. 305* v. *United States Postal Service*, 594 F.2d 988, 991 (4th Cir. 1979); *National Association of Letter Carriers* v. *United States Postal Service*, 590 F.2d 1171, 1174 (D.C. Cir. 1978); *Miles* v. *United States Postal Service*, 561 F.2d 1348, 1349-1350 (9th Cir. 1977); *National Association of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 918 (2d Cir. 1971); *Pittsburgh Metro Area Postal Workers Union* v. *United States Postal Service*, 463 F. Supp. 54, 57 & n.3 (W.D. Pa. 1978), aff'd, 609 F.2d 503 (3d Cir. 1979) (table). But see *Smith* v. *Daws*, 614 F.2d 1069, 1071-1072 (5th Cir.), cert. denied, 449 U.S. 1011 (1980).

$17,000 of which the jury attributed to the Postal Service), and that both the Union and the Postal Service had "acted maliciously or recklessly, or in callous disregard" of petitioner's rights, justifying awards of punitive damages in the amounts of $10,000 against the Union and $30,000 against the Postal Service (*ibid.*).

The district court adopted the jury's findings, including those against the Postal Service offered in an advisory capacity (Pet. App. A4, A15, A17, A18), in all but one respect: the district court held that sovereign immunity principles barred petitioner from recovering punitive damages against the Postal Service and that, because punitive damages were not recoverable from the Postal Service, as a matter of fairness the court would not impose them on the Union either (*id.* at A5 & n.5, A12, A18).[2]

The district court approved the jury's apportionment of the $47,000 in compensatory damages between the Postal Service and the Union, finding that petitioner, who was suspended and effectively discharged from employment with the Postal Service in February 1976 (Pet. App. A14), would have been reinstated by August 1977 if the Union had not breached its duty of fair representation by failing to take petitioner's grievance to arbitration (*id.* at

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[2] The district court explained (Pet. App. A18) that "the actions of the [Union], while supporting the jury verdict and findings of compensatory damages, were less reprehensible than the actions of the USPS. Therefore, as punitive damages cannot be assessed against the USPS, the Court does not deem it fair to impose punitive damages against the [Union]." The district court's decision was rendered prior to *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), in which the Court held that punitive damages may not be assessed against a union for breach of its duty of fair representation under the Railway Labor Act by failing properly to pursue an employee's grievance.

A15). Accordingly, the district court held the Postal Service liable for petitioner's lost wages and benefits from February 21, 1976, to August 1977, and held the Union liable for petitioner's lost wages and benefits from August 1977 until December 20, 1978, the date on which the jury issued its special verdict. See Pet. Br. 8 n.6. The district court also held the Postal Service liable for an additional $5,954.12 in compensatory damages—the amount of lost wages and benefits due petitioner for the period between December 20, 1978, and April 11, 1979, the date of the district court's hearing on the post-trial motions (Pet. App. A15, A18). Petitioner thus was awarded compensatory damages totalling $52,954.12—$22,954.12 to be paid by the Postal Service and $30,000 to be paid by the Union (*id.* at A12).

The district court also awarded petitioner $20,000 in attorney's fees—$15,000 to be paid by the Postal Service and $5,000 to be paid by the Union (Pet. App. A13, A17). In addition, the court taxed costs "in the amount of $1,463 to be borne jointly and severally in equal amounts by both defendants" (*id.* at A20). Finally, the court directed the Postal Service to reinstate petitioner within 60 days or, in the alternative, to pay petitioner for his loss of future earnings in the amount of $125,000 (*id.* at A12-A13, A19).

2. Both respondents appealed from the district court's judgment.[3] In a joint brief,[4] the Postal Service

[3] The Postal Service also sought a stay of the district court's order either to reinstate petitioner or to pay him $125,000 for loss of future earnings. By order of November 7, 1979, the court of appeals denied the request for a stay. Accordingly, the Postal Service has reinstated petitioner.

[4] See Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit (requiring consolidation of related appeals and limiting the number of briefs to one per side).

and the Union argued that the Postal Service had not discharged petitioner without just cause, that the Union had not breached its duty of fair representation to petitioner and that neither the Postal Service nor the Union had acted in reckless or callous disregard for petitioner's rights. Respondents also argued that one of petitioner's witnesses had erroneously been permitted to testify as an expert on key factual questions concerning fair representation and arbitration matters, that the award of damages for loss of future earnings was improper, and that attorney's fees may not be assessed against the Postal Service in the absence of an unequivocal waiver of sovereign immunity authorizing such an award (see *National Association of Letter Carriers, AFL-CIO* v. *United States Postal Service*, 590 F.2d 1171, 1179-1180 (D.C. Cir. 1978)). In a separate supplemental brief filed by leave of the court of appeals (see note 4, *supra*), the APWU argued that a union may not be held liable for damages for an employee's lost wages or benefits.[5]

The court of appeals rejected all of respondents' claims except one. Without any analysis, the court reversed the district court's judgment insofar as it held the Union liable for part of petitioner's lost earnings. The court of appeals' entire discussion of the point consists of the following statement (Pet. App. A5; footnote omitted):

> As Bowen's compensation was at all times payable only by the [Postal] Service, reimbursement of his lost earnings continued to be the obligation of the [Postal] Service exclusively. Hence, no portion of the deprivations—$47,000.00 plus

[5] The Postal Service requested, but was not granted, leave to file a supplemental brief on this issue.

> $5,954.12—was chargeable to the Union. *Cf. Vaca* v. *Sipes*, 386 U.S. 171, 195 (1967).

Judge Murnaghan dissented solely on the ground that the district court erred in admitting the expert testimony (Pet. App. A8-A11).

3. Respondents then filed petitions for rehearing, with the Postal Service suggesting rehearing en banc. The Union took issue solely with the ruling sustaining the propriety of the expert testimony. The Postal Service challenged, in addition, (i) the court of appeals' acquiescence in the findings that it had wrongfully discharged petitioner and that the Union had breached its duty of fair representation, (ii) the court's ruling that the Union could not be held liable for any of petitioner's lost earnings, and (iii) the award of attorney's fees against the Postal Service. The court of appeals denied these rehearing petitions by order of May 29, 1981 (Pet. App. A25).

Subsequently, on July 7, 1981, the court of appeals panel sua sponte elucidated the meaning and effect of its judgment by adding a new footnote to its original opinion (Pet. App. A27-A28). Following the statement in the text that "no portion of [petitioner's lost earnings] was chargeable to the Union," the court of appeals added the following clarification in footnote 6 (Pet. App. A5):

> We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection we note that no appeal was entered by the plaintiff from the judgment against [the] Service in the amount of $22,954.12.

Thus, of the original $52,954.12 in compensatory damages awarded for petitioner's lost earnings, the Postal Service was held liable for only the $22,954.12 awarded against it, and the Union was not

held liable for the additional $30,000 in damages originally assessed against it—even though the court of appeals did not disturb the district court's finding that the Union had breached its duty of fair representation.

Petitioner sought rehearing and rehearing en banc on the grounds that the entire amount of $52,954.12 should be assessed against the Postal Service or, in the alternative, that the original apportionment of damages between the Postal Service and the Union should be reinstated. The court of appeals denied the petition for rehearing on September 15, 1981.

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

This case arises out of a dispute involving the discharge of an employee under a collective bargaining agreement. As is typical of such disputes, the employee, petitioner here, sued both his employer, the Postal Service, for wrongfully discharging him, and his union for breaching its duty of fair representation by failing to arbitrate his grievance based on the wrongful discharge. The district court, adopting the findings of a jury, agreed that petitioner's discharge was wrongful and that his union's subsequent refusal to challenge that discharge through the grievance arbitration procedure also was wrongful. The district court and jury further found that petitioner lost $17,000 in wages between the time of his discharge and the time when he would have been reinstated, had the Union arbitrated his grievance, and that petitioner lost an additional $30,000 in wages between the time when he should have been reinstated and the date of the jury's verdict in this case. The issue presented is which defendant—the

employer or the Union—should bear the additional damages for the wages lost by the employee after the point at which he would have been reinstated but for the Union's misconduct.

A. This Court has never directly addressed this question. Without focusing precisely on the lost wages component of damages recoverable in breach of collective bargaining agreement/breach of duty of fair representation cases, however, the Court has enunciated a "governing principle" that liability in such cases should be apportioned "between the employer and the union according to the damages caused by the fault of each," *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967), and has warned unions that they will be held liable "for those damages that flow[] from their own conduct." *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970). A rule of law that assesses to a union damages for back wages that would not have been lost but for the union's independent wrongful conduct, rather than a rule that shifts such liability to the employer, would appear to comport more closely with these pronouncements.

B. In the absence of a controlling statute or any square precedent of this Court, the apportionment issue raised by this case must be decided on the basis of the federal common law considerations of labor law policy and basic equity. In our view, those considerations support the establishment of a rule of union liability for back wage damages that are the result of the union's misconduct.

To be sure, it is the employer's wrongful action that "triggers" the employee's loss of wages. Thereafter, however, if the union acts in accordance with its duty of fair representation, the employee will be reinstated or otherwise provided relief and his dam-

ages will cease accruing. Accordingly, if the union fails to act or acts improperly and, as a result, the employee's damages continue to accrue, it is reasonable that such damages be borne by the union. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen* v. *City of Independence*, 445 U.S. 622, 654 (1980).

Federal labor law policy also would be best served by an apportionment of liability. Placing responsibility on the union for its own misconduct will likely strengthen the union's incentive to fulfill its duty to represent the employees fairly. Moreover, the apportionment approach preserves the arrangement of liabilities and expectations among the parties as they have developed it. When an employer discharges an employee under a collective bargaining agreement that permits discharge only for just cause and provides for resort to a grievance procedure, the employer is entitled to expect that any wrongful discharge will be brought to his attention by the union in the context of the grievance machinery, thereby limiting his liability for back wages to the maximum attributable to the period provided in the agreement for initiating and implementing the grievance process. If the union fails to establish the wrongfulness of the employer's conduct within the context of the grievance machinery, the employer should not be saddled with the additional liability attributable to wages lost after the time when the employer would have reinstated the employee but for the union's misconduct.

Implementation of an apportionment approach would not impose an unwarranted "chill" on unions' discretion not to process every employee grievance through arbitration. Unions may not be held liable for breach of the duty of fair representation, and

may not be forced to pay damages at all, unless they are found to have acted arbitrarily, discriminatorily or in bad faith. Hence, a union that acts in good faith need not fear that an improvident decision will subject it to monetary liability. Nor would the imposition of liability for lost wages pose a substantial threat to the financial security of unions. Such compensatory damages, unlike punitive damages, generally do not involve large amounts of money, and any losses must be mitigated by the discharged employee. Thus, there is no reason to shift that liability from the party that caused it to a party that did not.

II.

In the event the Court declines to adopt an apportionment rule, we agree with petitioner that, in the typical case, the employer, rather than the innocent employee, should be liable for the wages lost subsequent to the union's breach of its duty of fair representation. Because of the peculiar procedural posture of this case, however, if the Court affirms the court of appeals on the apportionment issue, it should not increase the damages that the district court assessed against the Postal Service.

In the absence of a cross-appeal, an "appellee may not attack the decree [rendered below] with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary * * *." *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). Here, the judgment entered by the district court did not require the Postal Service to pay all of petitioner's damages, yet petitioner did not appeal. Therefore, he is foreclosed from arguing for enlargement of relief against the Postal Service on appeal.

ARGUMENT

I. A UNION THAT HAS BREACHED ITS DUTY OF FAIR REPRESENTATION MAY BE HELD LIABLE FOR THAT PORTION OF A WRONGFULLY DISCHARGED EMPLOYEE'S LOST WAGES ATTRIBUTABLE TO THE UNION'S BREACH

The facts of this case are typical of most disputes involving the discharge of an employee under a collective bargaining agreement. In such cases, an aggrieved employee generally sues both his employer for the initial violation of the agreement, and his union for breaching its duty of fair representation by failing adequately to process the grievance arising out of the employer's violation. The employee thus normally seeks relief from both his employer and his union. This Court has recognized that an employee who can establish both a breach of the union's duty of fair representation and a violation of the employer's obligations under the collective bargaining agreement is entitled to relief of some sort against both his union and his employer. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 572 (1976).

Here, petitioner established that his employer, the Postal Service, violated the collective bargaining agreement by discharging him without just cause. He also showed that the Union breached its duty of fair representation by its "arbitrary and perfunctory handling of [his] apparently meritorious grievance" (Pet. App. A15, A17).[6] In addition, petitioner

[6] Both respondents contested these factual allegations in the courts below. The district court, however, relying on the jury's special verdicts against the Union and advisory findings against the Postal Service, accepted petitioner's version of the facts, and the court of appeals did not disturb those findings. Neither the Postal Service nor the Union has filed a cross-petition seeking this Court's review of those concurrent findings of fact.

proved that but for the Union's failure to arbitrate his grievance in accordance with the provisions of the collective bargaining agreement, he would have been reinstated substantially prior to his actual reinstatement date (*id.* at A15). Finally, petitioner showed that between the date of his wrongful discharge and the time he would have been reinstated under a favorable arbitration award he lost wages in the amount of $17,000, and that he lost an additional $30,000 in wages between the time when he should have been reinstated and the favorable verdict he received in this case (*id.* at A12, A18, A22).

The question presented by this case is whether the district court properly assessed damages against the Union for the additional lost wages that petitioner would not have suffered but for the Union's breach of its duty of fair representation. The district court held that in these circumstances a proportionate share of the back wages should be borne by the Union (Pet. App. A12, A17-A18),[7] but the court of appeals reversed on the ground that the Union could not be liable for lost wages (*id.* at A5). For the reasons set forth below, we urge the Court to reinstate the judgment of the district court.

A. This Court Has Indicated That A Union Must Bear Responsibility For Damages It Causes To A Wrongfully Discharged Employee

1. This Court has not directly addressed the question of the proper apportionment of damages for back wages in cases in which some of the wages would not have been lost (because the employee would

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[7] The district court recognized (Pet. App. A17) that "there is authority suggesting that only the employer is liable for damages in the form of back pay," but nevertheless found (*ibid.*) that "this is a case in which both defendants, by their illegal acts, are liable to plaintiff."

have been reinstated or his loss otherwise remedied earlier) but for the union's breach of its duty of fair representation. Because the Court never has been required to pass on the actual apportionment process, it has not focused on exactly what damages are apportionable, or precisely how the apportionment should be made—the questions that are presented here. Nevertheless, the Court has expressed a general concern that damages be fairly assessed against the party that caused them. The apportionment made by the district court in this case, we submit, meets that concern.

The Court first alluded to the apportionment issue in *Vaca* v. *Sipes*, 386 U.S. 171 (1967). In *Vaca*, the Court held that federal and state courts have jurisdiction over actions by employees against their unions for breach of the duty of fair representation, notwithstanding the fact that the National Labor Relations Board also has jurisdiction over such breaches as unfair labor practices under Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A).[8] One reason the Court gave for its holding was that courts adjudicating Section 301 suits[9] against employers for breach of contract fre-

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[8] The NLRB first held that a union's breach of its duty of fair representation is an unfair labor practice in *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 67-68 n.3 (1981) (Stewart, J., concurring).

[9] This Court has held that suits for breach of a collective bargaining agreement may be brought in federal court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Individual employees may also bring suit for breach of contract under Section 301. *Smith* v. *Evening News Association*, 371 U.S. 195, 200-201 (1962).

quently are required to determine whether there has been a breach of the duty of fair representation by the union. When a court making such a determination finds that both a violation of the collective bargaining agreement and a breach of the duty of fair representation have occurred, "the court must fashion an appropriate remedy" (386 U.S. at 187). In such a case, the Court emphasized, a trial court should be in a position to apportion the damages to the party that caused them (*ibid.*):

> Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals [a court and the NLRB] to repair a single injury.

Because the Court held in *Vaca* that the employee failed to prove that his union in fact had breached the duty of fair representation, it was not required to consider what relief was available against the union. Nevertheless, the Court went on to provide some guidance to the lower courts on the "difficult question [of] what portion of the employee's damages may be charged to the union * * *" (386 U.S. at 196). First, the Court made clear that an award against a union should not include "damages attributable *solely* to the employer's breach of contract" (*id.* at 197; emphasis added). Conversely, an employer is not to be held liable for any increase in damages occasioned by a union's failure to satisfy its duty to

represent an employee fairly. As the Court explained (*id.* at 197-198):

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.

Although the Court did not single out damages attributable to lost wages, there is no reason to assume that the "governing principle" enunciated in *Vaca* would not be equally applicable to all types of damages.

The Court reaffirmed the principle that each party would be liable only for damages that "flowed from [its] own conduct" in *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970). Indeed, in that case the Court implied that damages *for loss of employment* would be recoverable against the union in some circumstances (*ibid.*).

Czosek involved a suit by employees under the Railway Labor Act, 45 U.S.C. (& Supp. III) 151 *et seq.*, for damages against their railroad employer, their union, and national and local officers of the union for wrongful discharge and breach of the duty of fair representation. The district court dismissed the complaint against both the employer and the union, but the court of appeals reinstated the action against the union defendants.[10] The union and its officials

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[10] The district court dismissed the complaint against the employer for failure to exhaust administrative remedies available under the Railway Labor Act and for lack of diversity jurisdiction. The complaint against the union was dismissed

then sought review in this Court on the ground that they were not subject to suit without joining the employer as a co-defendant.

The Court found "groundless" the union defendants' fears that, if sued alone, they might "be forced to pay damages for which the employer is wholly or partly responsible" (397 U.S. at 28-29). Rather, the Court explained (*id.* at 29; footnote omitted),

> judgment against [the union and its officials] can in any event be had only for those damages that flowed from their own conduct. Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer.[11]

Accordingly, this Court agreed with the court of appeals that the employees' suit against the union

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for failure to allege a breach of the fair representation duty and because, under the Railway Labor Act, the employees could have processed their own grievances (397 U.S. at 27).

[11] As noted above (page 16, *supra*), *Czosek* was brought under the Railway Labor Act, which permits an employee whose union fails to process his grievance to press it himself (45 U.S.C. 153 First (i), (j)). It was because the discharged employees had not pursued the grievances on their own that their claims against the railroad had been dismissed (see note 10, *supra*). Likewise, because the employees had independent access to the grievance procedure, by which they could have recovered their lost pay, their damages against the union properly were limited to the additional expense they would have incurred in pressing their grievances without the usual assistance of the union.

defendants could go forward without the employer as a co-defendant.

Thus, in the context of a suit against a union alone, the Court assured the union that it would not be exposed to liability for damages flowing *solely* from the employer's alleged breach of contract. At the same time, the Court reiterated that a union and its officials will be held liable "for those damages that flow[] from their own conduct" (397 U.S. at 29). Indeed, by guaranteeing that "damages against the union for loss of employment are unrecoverable *except* to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer" (*ibid.*; emphasis added), the Court indicated that in a proper case the damages assessable against the union could be measured by the employment contract.[12]

Finally, the Court recently alluded to the apportionment issue in *Clayton* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America*, No. 80-5049 (May 26, 1981). That case concerned the question whether an employee is required to exhaust internal union appeals procedures before bringing a Section 301 action against his employer and an action against his union for breach of its duty of fair representation. In holding that exhaustion is not a prerequisite to suit where the internal union procedures could not yield all the relief sought by the employee, the Court, in passing, simply reaffirmed the *Vaca* "general prin-

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[12] In view of the Court's express reference (397 U.S. at 29; emphasis added) to "damages against the union *for loss of employment*" and the presumption against double recovery, the fair inference from the Court's statement is that in an appropriate case the employer's liability for back wages would be shifted to the union.

ciple" that "an employee who establishes that the union breached its duty of fair representation in processing his grievance, and that the employer breached the collective-bargaining agreement, may be entitled to an award of damages 'apportion[ed] . . . between the employer and the union according to the damage caused by the fault of each' " (slip op. 10 n.15, quoting *Vaca* v. *Sipes*, *supra*, 386 U.S. at 197-198). What is noteworthy about *Clayton*, however, is its reference (slip op. 10) to the UAW Constitution's provision for the recovery of backpay through the internal appeals procedures. At least one union thus appears to find nothing inherently anomalous about assessing to unions liability for wages that would not have been lost but for the union's own misconduct.

2. Although the Court has not directly addressed the question presented by this case, individual Justices have. In his concurring opinion in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), Justice Stewart unequivocally stated his view that a union may be held liable for the share of an employee's lost earnings that is attributable to the union's misconduct (*id.* at 572-573). The issue discussed by the majority opinion in *Hines*, in which Justice Stewart joined, was whether an action by employees against their employer for wrongful discharge in violation of a collective bargaining agreement was properly dismissed on the basis of an arbitral award in the employer's favor, when the employees' suit against their union for failing adequately to represent them in the grievance and arbitration process remained to be tried. The Court observed that if the employees could prove that the union had breached its duty of fair representation by failing to conduct an adequate investigation into

the incident that resulted in their discharges, as they alleged, the entire arbitral process would have been tainted and, as a result, "the bar of the finality provisions of the [collective bargaining] contract" would be removed (*id.* at 567). Accordingly, the Court held, dismissal of the complaint against the employer was improper because the discharged employees, "if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint [arbitration] committee, are entitled to an appropriate remedy against the employer as well as the Union" (*id.* at 572).

While the Court's opinion in *Hines* plainly contemplated an apportionment of damages between the employer and the union if, on remand, the district court were to hold both defendants liable, the Court did not discuss the issue. In a brief concurring opinion, however, Justice Stewart pointed out that if the employees could show at trial that the union had breached its duty and that the arbitral decision was thereby tainted, the employer would not be liable for the entire amount of the employees' lost wages. Rather, Justice Stewart explained, a portion of those lost earnings would be chargeable to the union (424 U.S. at 572-573 (emphasis added)):

> But this is not to say that proof of breach of the Union's representation duty would render [the employer] potentially liable for backpay accruing between the time of the "tainted" decision by the arbitration committee and a subsequent "untainted" determination that the discharges were, after all, wrongful.
>
> If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determina-

> tion. Liability for the intervening wage loss must fall not on the employer but on the union. Such an apportionment of damages is mandated by *Vaca*'s holding that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." [386 U.S. at 197-198.]

Thus, in Justice Stewart's view, the "governing principle" announced by the Court in *Vaca* not only permits, but actually "mandate[s]," that lost wages be apportioned between the union and the employer according to the fault of each.

Justice Stevens' concurring and dissenting opinion in *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), suggests agreement with Justice Stewart's view of a union's liability for lost wages. The Court in *Mitchell* was concerned with the question of which New York State statute of limitations is applicable to an action by an employee against his employer for wrongful discharge under Section 301, where binding arbitration already had resulted in an award sustaining the discharge. Because the employee's action in that case was barred by the 90-day limitations period that the Court held applicable, the Court had no occasion to discuss any issue concerning damages.

Justice Stevens did so, however, in a separate opinion emphasizing his view that, while the 90-day state statute of limitations applied to the employee's action against the employer for breach of the collective bargaining agreement, it would not apply to an action by the employee against his union for breach of its duty of fair representation. Justice Stevens' discussion of how the two causes of action are closely related, yet conceptually distinct, reveals an underly-

ing assumption that a union will bear the liability for lost wages attributable to its breach. As Justice Stevens explained (451 U.S. at 73 n.2; emphasis added):

> The claims are closely related because, to prevail against the employer, the employee must establish that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement; similarly, to prevail against the union, the employee must prove that the union breached its duty of fair representation and, if he wishes to recover *loss of employment damages for which the union is responsible*, that the employer breached the agreement.

Justice Stevens further noted that while an arbitration decision in favor of an employer is significant in an employee's suit against his union, it is not necessarily dispositive in that context (*id.* at 73-74 n.4; emphasis added):

> *The determination whether the employer breached the agreement may be highly relevant to the amount of damages caused by the union's alleged breach of duty,* but it is not necessarily controlling with respect to the threshold question whether there was any breach of duty by the union at all. * * * *The fact that the underlying discharge may not have violated the collective-bargaining agreement* does not necessarily absolve the union of liability for its breach, although it *may limit the size of the employee's recovery against the union.*

Both sets of remarks clearly indicate that in appropriate cases damages recoverable from a union may be measured by the employment contract.

B. Considerations Of Equity And Federal Labor Law Policy Support A Rule of Law That Assesses Against A Union Damages For Back Wages That Would Not Have Been Lost But For The Union's Own Misconduct

Here, as in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 47 n.9 (1979), the Court is "concerned * * * with judicially created remedies for a judicially implied cause of action." The duty of fair representation is not an express creature of statute, but rather has been implied from the exclusive statutory authority of unions to represent all the employees in a bargaining unit. See *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, 442 U.S. at 46-47; *Vaca* v. *Sipes*, *supra*, 386 U.S. at 177; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953); *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944). Hence, in the absence of any square precedent of this Court or any controlling legislation, the question of what remedies are available in fair representation suits, like the question of the appropriate means of enforcing collective bargaining agreements under Section 301 (see *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957)), should be answered by resort to the federal common law considerations of national labor law policy and basic equity. See *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, 442 U.S. at 47-48; *Steele* v. *Louisville & Nashville R.R.*, *supra*, 323 U.S. at 204. In our view, those considerations support a rule of law that would assess against a union damages for back wages that would not have accrued but for the union's breach of its duty of fair representation.[13]

[13] Despite the plethora of lower court cases in which the apportionment issue has arisen, few of the courts that have considered the issue have taken policy considerations into

The justification generally proffered for the non-apportionment of damages for lost wages is that, in the relationship among the union, the employer and

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account. Rather, courts on both sides of the issue have simply seized on language from prior opinions and chosen one position or the other. See, *e.g.*, *Seymour* v. *Olin Corp.*, No. 80-5227 (5th Cir. Jan. 22, 1982) (union not liable for lost wages); *Milstead* v. *International Brotherhood of Teamsters*, 649 F.2d 395 (6th Cir. 1981) (same); *Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F.2d 888, 892 (4th Cir. 1980) (on the facts of the case, union not liable for back wages); (*Foust* v. *International Brotherhood of Electrical Workers*, 572 F.2d 710, 718 (10th Cir. 1978), rev'd on other grounds, 442 U.S. 42 (1979) (liability for lost wages assessed against union by district court; union objected only to amount of lost wages proved); *Harrison* v. *United Transportation Union*, 530 F.2d 558, 562 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976) (union liable for back wages where its breach of the duty of fair representation extinguished employee's own right to pursue his grievance before the Railroad Adjustment Board); *De Arroyo* v. *Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877 (1970) (employer liable for all lost wages in the absence of evidence that but for the union's conduct the employees would have been reinstated or reimbursed at an earlier date); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 367 F.2d 489 (4th Cir. 1966), cert. denied, 386 U.S. 960 (1967) (lost wages assessed against union by trial court and not challenged on appeal); *Atwood* v. *Pacific Maritime Association*, 432 F. Supp. 491, 495-496 (D. Or. 1977) (citing Justice Stewart's concurring opinion in *Hines* v. *Anchor Motor Freight, Inc.*, *supra*); *Holodnak* v. *Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), rev'd in part on other grounds, 514 F.2d 285 (2d Cir.), cert. denied, 423 U.S. 892 (1975) (back wages recoverable only from employer).

Moreover, the substantial body of lower court case law holding that unions are not liable for back wages can be traced to *De Arroyo* v. *Sindicato de Trabajadores Packinghouse, AFL-CIO*, *supra*, the first post-*Vaca* decision of which we are aware that deals with the apportionment issue. The

employee, the employer is the party responsible for the payment of the employee's wages. As the court of appeals put it (Pet. App. A5), "[a]s [petitioner's] compensation was at all times payable only by the [Postal] Service, reimbursement of his lost earnings continued to be the obligation of the [Postal] Service exclusively." Moreover, it is asserted, the employer should remain liable for lost wages because he "caused" those damages by breaching the collective bargaining agreement in the first instance.

Upon analysis, however, arguments based on causation undermine, rather than support, nonapportionment. See Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach*, 1981 Wis. L. Rev. 155, 175-176. If the union acts, and acts properly, on the employee's behalf, the employee will be reinstated or otherwise provided relief, and his damages will cease accruing. Thus, while the employer's action may "trigger" the initial loss of wages, the employer is not the "cause" of any lost earnings accumulated after the point at which a favorable arbitral decision or other grievance procedure would have reinstated or otherwise compensated the

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limited holding in *De Arroyo*, however—"[i]n a case such as ours, where there has been no suggestion that the union participated in the Company's discharge and *where there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date*, we conclude that the Union's conduct cannot be said to have increased or contributed to the damages attributable to the Company's improper discharge," 425 F.2d at 289-290 (emphasis added)—is a weak reed on which to base a general rule that unions are never liable for back wages in fair representation cases.

These decisions are discussed in Martucci, *Employer Liability for Union Unfair Representation: The Judicial Predilection and Underlying Policy Considerations*, 46 Mo. L. Rev. 78, 95-100, 104-112 (1981).

employee.[14] Accordingly, if the union does not act, or acts improperly, despite a breach of the collective bargaining agreement, and the employee's back wages therefore continue to accrue, it is both logical and equitable that such damages should be borne by the union. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen* v. *City of Independence*, 445 U.S. 622, 654 (1980).

An apportionment approach is also suggested by considerations of federal labor law policy. As this Court observed in *Vaca* v. *Sipes*, *supra*, 386 U.S. at 182, "[t]he federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." Therefore, in determining whether a union should be held liable for the portion of an employee's lost wages that are attributable to its breach of the fair representation duty, the Court, as it did in *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, 442 U.S. at 47, should seek to fashion "a remedial scheme that will best effectuate the purposes of [federal labor law], recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace."

The particular instrument of federal labor law policy involved here is the procedure established under the collective bargaining agreement for the peaceful resolution of employee grievances, which this Court has described as "the very heart of the system of industrial self-government." *United Steelworkers* v.

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[14] Of course, if the union also is involved in the initial breach of contract, the union and the employer may be jointly and severally liable for the employee's back wages from the time of discharge. See *Vaca* v. *Sipes*, *supra*, 386 U.S. at 197 n.18.

Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). Congress has explicitly encouraged resort to such grievance machinery for the resolution of labor disputes in private industry in general, 29 U.S.C. 173(d), and has recognized its efficacy in the particular context of the Postal Service as well, 39 U.S.C. 1206(b).[15] Indeed, it was because of the union's special status as the exclusive collective bargaining representative[16] and its central role in handling employee grievances under the collective bargaining agreement that this Court first recognized the union's corresponding duty to represent the employees fairly. See *Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 337 (duty of fair representation under the National Labor Relations Act); *Steele* v. *Louisville & Nashville R.R.*, *supra*, 323 U.S. at 202-204 (duty of fair representation under the Railway Labor Act). "Since that landmark decision [in *Steele*], the duty of fair representation has stood as

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[15] 39 U.S.C. 1206(b) provides that "[c]ollective-bargaining agreements between the Postal Service and bargaining representatives recognized under section 1203 may include any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration, or the parties may adopt any such procedures by mutual agreement in the event of a dispute."

[16] The Postal Reorganization Act provides for "exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative." 39 U.S.C. 1203(a). The courts have recognized the exclusive status of certified bargaining representatives of Postal Service employees. See *Winston* v. *United States Postal Service*, 585 F.2d 198 (7th Cir. 1978); *National Alliance of Postal & Federal Employees* v. *Klassen*, 514 F.2d 189 (D.C. Cir.), cert. denied, 423 U.S. 1037 (1975).

a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 182.

These same considerations that resulted in the recognition of a duty of fair representation in the first place also call for union liability for back wages that accrue after the time when proper action by the union would have resulted in an employee's reinstatement. That is, placing responsibility on the union for its own misconduct would likely strengthen the union's incentive to satisfy its duty of fair representation, thereby reducing the likelihood that it would, as in this case, "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 191.[17] Improved performance of the union's duty to represent employees fairly, in turn, "strengthens the employer's confidence in the union" (*International Brotherhood of Electrical Workers* v. *Foust*, *supra*, 442 U.S. at 51) and encourages the use of private grievance machinery rather than resort to the courts.

Moreover, the apportionment approach preserves the arrangement of liabilities and expectations among the parties as they have developed them, as is appropriate for a "system of industrial *self*-government." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. at 581 (emphasis added). When an employer discharges an employee under a collective bargaining agreement that permits discharge

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[17] See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 405 n.11 (1975): "A rule that divides damages by degree of fault would seem better designed to induce care * * *, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others."

only for just cause and provides for resort to a grievance procedure, that discharge is only the first step in the employee's permanent termination. That initial determination is conditioned on its consistency with the collective bargaining agreement, as construed through the use of its grievance machinery. Accordingly, the collective bargaining agreement entitles the employer to rely on the union to bring any wrongful discharge to his attention within the context of the grievance machinery, thus limiting his liability for lost wages to the maximum attributable to the period provided in the agreement for initiating and implementing the grievance process. If, however, a discharge in fact is wrongful, but, because of the union's breach of its duty the error is not brought to the employer's attention, the employer should not be saddled with the additional liability for the employee's lost wages for the time the employer would have reinstated him but for the union's wrong. As Justice Stewart explained in *Hines* v. *Anchor Motor Freight, Inc.*, *supra*, 424 U.S. at 573, in such circumstances the employer's "failure to reinstate * * * cannot be anything but rightful, until there is a contrary determination. * * * To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective [bargaining] agreement." [18]

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[18] Justice Stewart's reasoning, of course, applies equally to cases in which the union's breach is not in unfairly participating in the arbitration, but rather in refraining from entering the fray on the employee's behalf in the first place. In such instances, the employer denies reinstatement not because of an affirmative arbitral decision in his favor, but because of the expiration of the time period within which a grievance must

Such an apportionment rule in no way "shields" the employer from the consequences of his wrongful discharge of the aggrieved employee. The employer who violates the rights of an employee under a collective bargaining agreement remains liable for that breach even in the face of the union's wrongful handling of the employee's claim. The employer's liability, however, would be limited to the amount for which he would have been liable if the grievance machinery had functioned properly. "If the machinery malfunctions, additional liability resulting from the malfunction should fall on the machinery, or functionally, on the party that 'caused' the machinery to malfunction." Comment, *Apportionment of Damages*, *supra*, 1981 Wis. L. Rev. at 176. The employer thus is neither insulated from the natural consequences of its breach nor burdened with a liability for which he did not bargain.

To be sure, there are countervailing policy arguments. Foremost among them is the concern that the discretion of unions not to press every grievance to arbitration not be chilled by the threat of union liability for lost wages. See *Vaca* v. *Sipes*, *supra*, 386 U.S. at 191-195. The fear that unions will be forced to pursue through arbitration even the most frivolous of employee grievances, however, is largely illusory. The Court held in *Vaca* that a union may not be held liable for its decision not to process a grievance simply because the grievance subsequently is found to have merit (*id.* at 195). Rather, the Court emphas-

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be processed or arbitration must be sought. Just as in *Hines*, however, if the union had not breached its duty the employee would have been reinstated or otherwise granted appropriate relief, and there would have been no further accrual of damages. Accordingly, here, as in *Hines*, that accrual is the responsibility of the union.

ized (*id.* at 190) that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." This standard provides unions a broad berth within which to make the daily judgment calls concerning whether a particular employee complaint should be filed as a formal grievance and, if filed, whether the grievance should be arbitrated. A union that nonetheless is found to have breached its duty of fair representation should not be absolved of liability for its misconduct—arbitrary, discriminatory or bad faith conduct *should* be "chilled." See *id.* at 187 (a rule that compels the employer "to pay for the union's wrong [would be] slight deterrence, indeed, to future union misconduct"); *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, 442 U.S. at 58 (Blackmun, J., concurring in the result).[19]

Apportionment of damages on the facts of this case, for example, should not give rise to any unwarranted chilling effect. The jury found that the Union acted "maliciously or recklessly, or in callous disregard of the rights of [petitioner] in not taking [his] grievance to arbitration" (Pet. App. A22). In view of these facts, as found by the jury, it is unlikely that a reversal here would inhibit other union officials from declining to pursue grievance procedures on the

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[19] To the extent that the potential for exposure to back wages liability for breach of the duty of fair representation will compel unions to pursue to arbitration grievances that they otherwise would have rejected for lack of merit, the more appropriate solution would appear to be stricter enforcement by the lower courts of the *Vaca* standard for liability, rather than shifting liability for damages from the party that caused them, the union, to the employer.

basis of more reasoned grounds. See *Butz* v. *Economou*, 438 U.S. 478, 507 (1978).

Another possible concern with an apportionment approach is that it may be difficult to select the intermediate point after which the employer's liability for back wages terminates and the union's liability commences, in cases in which the union's breach arises out of its failure adequately to process an employee's grievance rather than out of its causing an erroneous arbitral result. Deciding when a dispute would have been resolved but for a union's misconduct, however, is no more difficult than "determining comparative degrees of negligence when both parties are concededly guilty of contributing fault." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 407 (1975). In any event, "even if there is some speculation in picking an exact point to determine the apportionment, the selection would undoubtedly be less arbitrary than unthinkingly apportioning the entire amount of back pay liability to the employer." Comment, *Apportionment of Damages*, *supra*, 1981 Wis. L. Rev. at 182 (footnote omitted). Cf. *United States* v. *Reliable Transfer Co.*, *supra*, 421 U.S. at 407 ("[p]otential problems of proof in some cases hardly require adherence to an * * * unfair rule in all cases").

Finally, the concern that the Court expressed in *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, 442 U.S. at 48, with "the financial stability of unions" is not equally apposite here. In *Foust*, the Court was confronted with an award of punitive damages against a union for breach of its duty of fair representation. As the Court noted (*id.* at 52), such awards are "of unforeseeable magnitude." Awards of compensatory damages, on the other hand, are fairly predictable from an employee's

past earnings record and are, at least, within a finite range. Moreover, such damages must be mitigated by the employee to the extent possible. Accordingly, liability for compensatory damages in the form of back wages poses a significantly less substantial threat to union solvency than liability for punitive damages, which the Court rejected in *Foust*.[20]

Furthermore, "the picture of the financially fledgling union is not universally accurate. Situations undoubtedly exist where the employer's financial condition is considerably more tenuous than that of the union." Comment, *Apportionment of Damages*, *supra*, 1981 Wis. L. Rev. at 177. Although the presence of the "deep pocket" of the government as employer may unfortunately color this atypical case, neither is the APWU a "fledgling union." More basically, however, if union treasuries are inadequate to fund adverse judgments based on the union's misconduct, it does not follow that such protection should be afforded at the expense of employers. Rather, because the concern for protecting union treasuries is more a question of collective versus individual rights than a question of apportionment *vel non*, it is more appropriately considered in the context of determining the standard by which the union's duty of fair representation should be judged (see note 19, *supra*).

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[20] Municipalities, for example, are immune from punitive damages under 42 U.S.C. 1983 for many of the same reasons discussed in *Foust*. See *City of Newport* v. *Fact Concerts, Inc.*, No. 80-396 (June 26, 1981), slip op. 22-23. Yet municipalities are not immune from compensatory damages measured by the harm attributable to their misconduct. See *Owen* v. *City of Independence*, 445 U.S. 622 (1980); *Monell* v. *New York Department of Social Services*, 436 U.S. 658 (1978).

These public policy considerations, in other, closely related contexts, have led to the imposition of damages liability on unions, measured by the harm caused by their misconduct. The National Labor Relations Board, for example, regularly orders unions to reimburse employees for back wages attributable to a union's breach of its fair representation duty under Section 8(b(1)(A) of the NLRA, 29 U.S.C. 158 (b)(1)(A).[21] The same result should follow here.

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[21] This type of backpay award against the union—which is usually imposed jointly and severally on the union and employer where it is also found that the employer has acted wrongfully—was expressly approved by the Ninth Circuit in *NLRB* v. *Pacific Coast Utilities Service, Inc.*, 638 F.2d 73, 74 (1980):

> It was proper for the Board to rule that the employer and the union had joint and several liability to compensate the employee for any loss of back pay. Given the determination that discharge was wrongful, it follows that the failure of the union to represent the employee was damaging to him and a contributing factor to his loss of pay.

See also *Newport News Shipbuilding & Dry Dock Co.*, 236 N.L.R.B. 1470 (1978), enforcement granted in part as modified and denied in part, 631 F.2d 263 (4th Cir. 1980) (union and employer held jointly and severally liable for employee's loss of pay); *Sargent Electric Co.*, 209 N.L.R.B. 630, enforced, 87 L.R.R.M. 3275 (3d Cir. 1974) (same); cf. *Local 417, International Union, United Automobile Aerospace & Agricultural Implement Workers of America*, 245 N.L.R.B. 527 (1980) (union alone held liable for employee's lost wages caused by union's failure to process grievance where union's failure to process grievance precluded determination whether company's discharge of employee had been wrongful). But cf. *NLRB* v. *Local 485, International Union of Electrical, Radio & Machine Workers, AFL-CIO*, 454 F.2d 17 (2d Cir. 1972) (in the absence of a finding that employee's discharge was wrongful, union cannot be held liable for employee's wages).

II. IF THE COURT OF APPEALS CORRECTLY ELIMINATED THE UNION'S LIABILITY FOR PETITIONER'S BACK WAGES, IT ALSO ACTED PROPERLY IN REFUSING TO ENLARGE THE POSTAL SERVICE'S LIABILITY TO INCLUDE THOSE ADDITIONAL DAMAGES

Petitioner urges (Br. 40-45) that if this Court declines to adopt a rule apportioning back wages between a breaching union and a breaching employer, it should reverse the court of appeals' judgment that the Postal Service is liable to petitioner only for the amount of compensatory damages found attributable to its actions ($22,954.12), rather than for the full amount of compensatory damages ($52,954.12). We, of course, agree that, as a general rule, if unions may not be held liable for the latter portion of an employee's lost wages, that loss should fall on the employer, not on the employee. In view of the peculiar procedural posture of this case, however, we believe that the court of appeals acted reasonably in refusing to enlarge the amount of the compensatory damages for which the district court, relying on the advisory jury, found the Postal Service liable.

To be sure, as petitioner contends (Br. 40), "*Vaca* v. *Sipes* empower[s] courts to do complete justice in a single proceeding for an employee who has been injured by both his employer's unjust discipline and his union's breach of the duty of fair representation." But while *Vaca allows* that result, it does not compel it in cases in which it is precluded by well-settled rules of procedure.

This Court has repeatedly stated that, in the absence of a cross-appeal, an "appellee may not attack the decree [rendered below] with a view *either to*

enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (emphasis added). Accord, *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479, 480-481 (1976) (per curiam); *United States* v. *Reliable Transfer Co.*, *supra*, 421 U.S. at 401 n.2; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970); *Le Tulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191-192 (1937). In petitioner's view (Br. 42), the judgment rendered by the district court was an award of $52,954.12 in his favor; from the standpoint of the Postal Service, however, the judgment required it to pay only $22,954.12 (see Pet. App. A12). Even accepting petitioner's contention that he is not seeking to enlarge his own rights, he plainly is seeking to decrease those of the Postal Service. According to the settled case law cited above, petitioner cannot do so without having filed his own cross-appeal.

In any event, even if the court of appeals had the power to increase the award against the Postal Service in the absence of a cross-appeal by petitioner (cf. 28 U.S.C. 2106), its failure to do so in this case was not unreasonable. Here, the district court specified separate damages awards for lost wages against the Postal Service and the Union.[22] Nevertheless, and

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[22] The district court did not provide for the lost wages liability to be joint and several, as it did in awarding costs (Pet. App. A12, A13). Contrary to petitioner's contention

despite the Union's vigorous contention in the district court that it could not be held liable for back wages (see, *e.g.*, C.A. App. 22-24),[23] petitioner did not seek or obtain any alteration of the language of the judgment order. Had the Postal Service failed to take an appeal from this order and simply paid petitioner the $22,954.12 in compensatory damages for which it was liable under the judgment, and had the Union appealed and secured a reversal of the $30,000 judgment against it, enlargement of the judgment against the Postal Service in order fully to compensate petitioner would hardly have been appropriate. Because the only difference here is that the Postal Service appealed from the award entered against it, the court of appeals acted reasonably in not enlarging that award.

(Br. 43), this Court's decision in *Vaca* v. *Sipes*, *supra*, 386 U.S. at 197 n.18, would not have precluded the district court from imposing joint and several liability as to the portion of petitioner's lost wages that accrued following the date he would have been reinstated if his grievance had been submitted to arbitration.

[23] "C.A. App." refers to the appendix filed in the court of appeals.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it eliminates the Union's liability for $30,000 of petitioner's lost wages.

Respectfully submitted.

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Respondent's Brief

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IN THE

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v.

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and

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT UNION

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QUESTION PRESENTED

Whether the damages allocation rule announced in *Vaca* v. *Sipes*, 386 U.S. 171, to govern hybrid employer breach of contract and union breach of the duty of fair representation cases, and since reaffirmed by this Court, should be reaffirmed or overturned?

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---

BRIEF FOR THE RESPONDENT UNION

STATUTE INVOLVED

Section 1208(b) of the Postal Reorganization Act (PRA), 39 U.S.C. § 1208(b),[1] provides:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal

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[1] While petitioner's complaint (J.A. 3-6) and brief (Pet. Br. at 3-4) cite § 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), and § 185(a), and § 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a), it is the PRA which governs labor relations in the postal service.

> Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.[2]

Section 1203(a) of the Postal Reorganization Act, 39 U.S.C. § 1203(a), provides:

> (a) The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.[3]

STATEMENT

In this hybrid breach of contract and breach of duty of fair representation suit, plaintiff-petitioner Charles Bowen contended, and a jury found, that the United States Postal Service had discharged Bowen without just cause in violation of the applicable collective agreement between the Postal Service and the American Postal Workers Union, AFL-CIO (APWU). The jury also found, as Bowen contended, that the APWU had breached its duty of fair representation in determining not to take the discharge to arbitration. The only question presented to this Court that affects the Union concerns the correct rule for allocating backpay damages in such suits. Moreover, both the employer (Brief for the Federal Respondents (Gov. Br.) 2-8) and the petitioner (Pet. Br. 7-12) set out in detail the procedural history of the case. This statement is therefore confined

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[2] Section 301(a) of the LMRA, the substance of which is identical to § 1208(b) of the PRA is quoted at Pet. Br. 3.

[3] Section 9(a) of the NLRA provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

to an outline of the reasons for the discharge, a full description of the Union's handling of the resulting grievance and a review of the jury verdict and the decisions below.

1. Bowen's discharge was precipitated by an incident in February 1976 when he allegedly assaulted a fellow employee, R. B. Morris. According to Morris, Bowen grabbed Morris and "shook" him, causing him to strike or scrape his face against a wall, knocking his glasses off, and causing his face to bleed. (Aff. of R. B. Morris, J.A. 104-105.) Although Morris did not report the incident, his injury was sufficiently serious that another employee noticed blood on Morris' shirt (J.A. 107); and the incident came to the attention of the employer when Morris sought first aid (Tr. 370-371).

Following the incident, Bowen was first suspended, pending an investigation, then given a notice of proposed removal on March 15, 1976 (J.A. 94-95), and removed from the Postal Service effective April 20, 1976 (J.A. 90).

The decision to discharge Bowen was made by the Postmaster of the Lynchburg Post Office, John D. Ripley, Jr., and announced to Bowen in a March 15, 1976, memorandum notice of Ripley's proposal to remove Bowen from the Postal Service (J.A. 95-97). As reasons for the proposed removal, Ripley cited the incident between Bowen and Morris, and problems Bowen was having passing required scheme-knowledge examinations.[4] In ad-

[4] At the time in question mail was distributed within a city like Lynchburg according to a city plan ("scheme") broken down by city primary and secondary schemes. See *Schemes, Assignments & Examinations, Methods Handbook*, Series M-5, March 4, 1974, Chapter 1 (herein "M-5"). The distribution clerk position required proficiency in sorting mail according to these schemes, for which clerks were tested. M-5 § 222.311. New employees were given scheme assignments, and were required to master them within a given time. M-5 § 241-242. Failure to report for scheme examinations and failure to maintain proficiency resulted in a series of graduated penalties culminating in discharge. M-5 §§ 242, 244.5, 261.

dition, Ripley's notice (J.A. 95-97) stated that elements of Bowen's past record, which had been reported to Ripley in an investigative memorandum from a United States Postal Inspector, would be considered in determining disciplinary action to be imposed if the charges against Bowen were sustained.[5]

2. Local Union President Robert Carr filed a grievance on behalf of Bowen on March 19, 1976, and Bowen filed an EEO charge alleging that his supervisor had discriminated against him on the basis of religion. (J.A. 92-93.) Despite the Union's actions, on March 30, Ripley announced his decision to remove Bowen from the United States Postal Service, in a letter of decision addressed to Bowen. (J.A. 90-91.)

The record evidence, which we now summarized, makes it plain that Bowen's grievance was pursued diligently by the Union through three of the four steps of the grievance-arbitration procedure.

Local President Carr investigated Bowen's case by conducting interviews with Bowen, with a supervisor

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[5] The Postal Inspector's report (J.A. 99-103) contained (in addition to information about the alleged assault on Morris):

1. An affidavit detailing Bowen's unprovoked assault on fellow employee John Verdinella, ten months earlier.

2. A threat to employee James Doss to "beat your ass" within a month of the Morris incident, also for no apparent reason.

3. Withheld step pay increase on March 30, 1971.

4. Proposed suspension for scheme examination failures on September 4, 1974.

5. Proposed suspension for second failure to pass scheme examinations on October 22, 1974.

6. A letter of warning, dated December 27, 1974, for scheme failures.

7. Information that Bowen failed to appear for scheduled scheme examinations five times.

8. Information that he failed scheme examinations 21 times in 32 attempts.

and with fellow employees, including R. B. Morris, the employee involved in the altercation. At least some of these interviews, including the interview with Morris, were tape recorded by Carr. In addition to the efforts of Carr, the National Union provided the assistance of Regional Representative Cecil Romine, who traveled from West Virginia to assist in the investigation. Bowen, in appreciation of Local President Carr's efforts, presented Carr with a white hat because "all nice guys should wear a white hat." And Bowen testified at trial that he found Romine to be a "very nice person." (J.A. 9-14, 51-52, 56-57.)

The Postal Service, however, remained firmly fixed in its position and rejected the Union's efforts to have Bowen reinstated at the first two steps of the grievance procedure. In accordance with normal practice, the grievance was thereupon forwarded to Regional Representative Walter Kenney in Washington, D.C., for processing at step 2B, the third step of the grievance procedure. (J.A. 83-84, 87-89.) In forwarding the matter, Carr wrote to Kenney contending that of the three reasons specified by Postmaster Ripley for removing Bowen only the assault charge had arguable merit. (J.A. 86.) With regard to that charge, Carr pointed out that Bowen's antagonist, Morris, and another postal worker, had made helpful taped statements to Carr and Carr urged Kenney to listen to those tapes. (J.A. 80, 86.) Romine's view was that although it was obvious that "something happened," the penalty of discharge was "too harsh." (J.A. 79.)[6]

Kenney listened to the taped statements, and discussed the matter with Local President Carr and Regional Rep-

[6] The grievance file also included evidence, collected by Carr and Romine during steps 1 and 2A of the grievance procedure, that Bowen's assault on Morris may have been mitigated by ill-treatment of Bowen by Morris and by Bowen's supervisor, Murray, who allegedly had stated repeatedly that he would "get rid of" Bowen (J.A. 25, 79-80; Tr. 250; Ct. Exh. 2, Tab 26).

resentative Romine. (J.A. 41-49.) So informed, Kenney presented the grievance at step 2B, again urging reinstatement and again without moving the Postal Service from its position.

Kenney testified that the grievance was a difficult one to sustain because the Eastern Panel of Arbitrators provided for in the agreement, in his 7½ year experience, had never reversed discipline involving assaults on the merits, success requiring provocation, mitigating circumstances or procedural defects; and because the presence of an independent Postal Inspector's report in the file strengthened the Postal Service's case against Bowen. Kenney also discounted Bowen's harassment charges as self-serving. For these reasons, Kenney did not believe arbitration was in order, but he certified the grievance to the national level (J.A. 73-74) pursuant to his general policy in discharge cases, so that the matter could be reviewed on the highest level. (J.A. 42-49.) He noted in his report: "I'm requesting that the APWU Arbitration Board consider, review and certify this case for arbitration. The removal is not for just cause." (J.A. 76.) This statement, Kenney testified, was made as a matter of routine, to transmit the question whether to go to arbitration to the national level (J.A. 44).

At National Headquarters, Bowen's file was reviewed by an Administrative Vice President of the Clerk Craft, Donald Johnson. Johnson was responsible for deciding whether or not the National Union would certify Bowen's case for arbitration. (J.A. 36-37; 40.) On the same day he reviewed Bowen's case, Johnson reviewed nine other grievances that were ready for certification to arbitration. He determined not to certify any of those cases for arbitration. (Ct. Ex. 1, Tab 27; Tr. 76; J.A. 39.) (This was not an unusual workload, for during the period in question, the first year of the 1975 collective bargaining agreement, Johnson and his two fellow clerk craft officers were responsible for screening approximately 7,359 grievance appeals. (Biennial Report to the National Conven-

tion of the APWU (Aug. 8-14, 1976) at 3; Resp. Br., *infra*, App. 1a-2a).)

Johnson brought to his task the background of having reviewed between 15,000 and 20,000 files in similar matters during the course of his six years of experience as a union officer (J.A. 62). In making his decision, Johnson spent approximately 15 to 30 minutes reviewing the grievance file, skimming over routine forms but reading substantive matters, including the affidavits (J.A. 40, 59-64). On the basis of his review of the file, Johnson decided not to arbitrate Bowen's case for the following reasons:

> 1. The Union had been unsuccessful in winning reversal of discipline through arbitration of assault cases;
>
> 2. The Postal Inspector's investigative memorandum addressed to Postmaster Ripley was thorough and credible; and,
>
> 3. The information in the file supported the view that Bowen had an apparent propensity for violence directed at fellow employees. (J.A. 63-65, 133.)[7]

Johnson discounted allegations that Bowen had been harassed by postal officials and fellow workers as typical and unpersuasive (J.A. 60-61, 66-67). Johnson did not listent to the tape recording to which Local President Carr had specifically directed the attention of Regional Representative Kenney. Johnson did, however, read summaries of interviews of the same principal witnesses and the sworn statements attached to the Postal Inspector's report. (J.A. 59-69.)

On August 17, 1976, Johnson sent a telegram to Robert Carr stating that "based on the information contained in the file—previous negative arbitration and/or other decisions on the same issue, [and] the employee's past record" the arbitration board had determined not to

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[7] Johnson did not know Bowen personally, but made his decision solely on the basis of the information in Bowen's file (J.A. 36-40).

arbitrate.[8] The telegram informed the Local of its right to arbitrate Bowen's grievance on its own. Local President Carr, Bowen's strongest advocate, determined not to arbitrate the grievance. (J.A. 53.)[9]

As the foregoing review of the evidence shows, there is not a scintilla of proof that the union or any of its officers were motivated by animus toward Bowen. Nor has it even been contended that Bowen's interests were not vigorously and intelligently forwarded at the local and regional level. Rather, Bowen's case rests on the contention that the responsible National Union official allegedly made his decision not to arbitrate in a careless or perfunctory manner. The adequacy or inadequacy of his review of the grievance file, in effect, became the question for decision by the jury.

In support of his contention Bowen proffered the testimony of Gladys Johnson, whose experience in screening grievances was as a former president of a local union of a different international union—the International Union

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[8] In addition to the Postal Inspector's report documenting certain alleged misconduct by Bowen, the Union's grievance file contained the following information about Bowen's work record (J.A. 96, 101-103, 108-131):

1. Warning dated June 15, 1975 for miscellaneous deficiencies, including changing his schedule without approval, failing to report as scheduled, and failure to pass scheme examinations, for which he was counselled on July 24, 1975.

2. Unsatisfactory performance, leading to a union-management conference on September 26, 1975.

3. Proposed suspension on October 2, 1975 for failure to pass scheme examinations.

4. Warning letter dated October 31, 1975 for scheme examination failures, "belligerent attitude toward your fellow employees," and continued tardiness.

[9] If the Local had chosen to arbitrate the case and won, the National Union would have paid the cost; but, if the Local had lost the arbitration case, the Local would have had to bear its own expense (J.A. 53).

of Electrical Radio and Machine Workers.[10] Mrs. Johnson testified that she had taken "approximately six (6) or seven (7) hours" on the file. (J.A. 23.) She indicated that National Union Vice-President Johnson should have asked that the tapes of interviews be forwarded for his review. She testified that a witness statement from a co-worker that strongly supported Bowen's allegations of harassment would have told her to "turn every stone" in Bowen's case. It was her opinion that the fact that Morris' testimony concerning Bowen's assault on him was uncorroborated "would mean . . . that Mr. Bowen had a good chance of winning his arbitration or the case shoul dgo to arbitration";[11] and, that if Bowen's case had gone to arbitration, he would have won reinstatement, with or without back pay. (J.A. 23-36.) She concluded by stating that, in her local union, "where there is any doubt that the company was right in justifiably discharging Bowen we would have recommended arbitration." (J.A. 16-21, 34, 36.) National Union Vice Presi-

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[10] In dissent with regard to the admissibility of Mrs. Johnson's testimony, Judge Murnaghan summarized her qualifications as follows:

> Ms. Johnson's qualifications to testify as an expert in the areas to which the opinions she expressed pertained were as follows: (1) she served a local union not connected with the American Postal Workers Union as President for six years and Secretary for six years; (2) during the twelve year period, she served on the local grievance committee charged with processing and sometimes arbitrating local employee grievances; (3) she had on occasion assisted in the preparation of arbitration cases on the local level; and (4) she had attended her union's labor relations school. As the list indicates, Ms. Johnson's experience was gained entirely at the local level. She had no exposure to methods employed and considerations weighed when, under the applicable grievance procedures, following exhaustion at the local level, the matter was referred first to the regional, and ultimately to the national level. [Pet. App. A10.]

[11] In his letter to Postmaster Ripley in the grievance file, Bowen denied shaking or kicking Morris. (J.A. 81-83.) At trial Bowen acknowledged shaking Morris. (Tr. 121-122, 131.)

dent Johnson testified that application of this standard by the APWU would be a "farce . . . to the collective bargaining system" and "would break a union." (J.A. 65.)

The trial court instructed the jury that a breach of the Union's duty could be found if the union acted arbitrarily, discriminatorily, or in a perfunctory manner, and that "[t]he word perfunctory as used in this charge means to act carelessly, superficially, indifferently or without interest in the subject matter." (Tr. 593-594.) As summarized by Bowen's counsel in closing argument, the case against the Union was limited to proof of National Union Vice President Johnson's purportedly perfunctory handling of Bowen's appeal at the fourth level of the grievance procedure. (Tr. 565-567.) Counsel argued to the jury that the Union was guilty of unfair representation "not because Mr. Johnson had anything against Mr. Bowen; he didn't know Mr. Bowen . . . he was careless . . . It was just perfunctory performance. He didn't care." (Tr. 565.)

3. The trial court also instructed the jury to "break [the damages] down" by determining a hypothetical date when an arbitration of the grievance would supposedly have been completed, with Bowen's loss of pay due to his discharge before that date being the responsibility of the Postal Service and after that date the responsibility of the Union. (Tr. 600-602.) The only evidence of damages offered was that Bowen had lost approximately $47,000 in salary from his discharge until trial of his case.

The jury returned a special verdict finding that the APWU had breached its duty of fair representation "maliciously or recklessly, or in callous disregard" of Bowen's rights; that the Postal Service had discharged Bowen without just cause, in violation of the contract between the Postal Service and the APWU; and that the Postal Service, too, had acted maliciously or recklessly, or in callous disregard of Bowen's rights. (Pet. App.

A21-A22.) Backpay lost by Bowen was assessed $17,000 against the Postal Service and $30,000 against the union.[12]

The district judge (Judge Turk) in his own findings and conclusions, inferred that the jury had found that the hypothetical arbitration to which the jury was instructed to refer would have occurred by August 1977, one year after the Union's decision not to arbitrate. (Pet. App. A15.) Accordingly, that court held that the jury properly assessed as damages to be paid by the Union approximately two-thirds of Bowen's lost wages. (Pet. App. A18.)[13]

The Court of Appeals for the Fourth Circuit affirmed the judgment of the trial court that the Postal Service had breached the collective agreement and the Union had breached its duty of fair representation, but overturned the order that the Union pay $30,000 in backpay, citing *Vaca* v. *Sipes*, 386 U.S. 171, 195 (Pet. App. A5, A8.) That court did not, however, revise the judgment against the Service, as it made clear by the later addition of footnote 6 to its opinion observing that "no appeal was entered by the plaintiff from the judgment

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[12] Paradoxically, the jury attempted to award punitive damages of $30,000 against the Postal Service, but only $10,000 against the APWU (Pet. App. A21-A22). These amounts were set aside by the trial court on the grounds that "sovereign immunity" insulated the Postal Service from punitive damages, and that it would be "unfair" to assess punitive damages only against the Union because its conduct was "less reprehensible" than that of the Postal Service. (Pet. App. A18.)

[13] The trial court added to the amount owed by the Postal Service $5,954.12 in wages and benefits lost by Bowen between the trial and the entry of judgment (Pet. App. A18). In addition, the court held that in light of the "dismal outlook for his reemployment", the employer was obliged either to reinstate Bowen within 60 days or pay him $125,000 for future lost earnings. (Pet. App. A18-A19). Finally, the court awarded $20,000 in attorneys' fees because of the defendants' "bad faith," divided $15,000 against the USPS and $5,000 against the APWU, and costs jointly and severally against both. (Pet. App. A-17, A19-A20.)

against [the] Service in the amount of $22,954.12." (*id.*) Petitions for rehearing by all three parties were denied.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The particular circumstances of this case place in an artificial light the central legal issue presented. That question is *not* whether a discharged employee who succeeds on the merits of a hybrid breach of contract and breach of the duty of fair representation suit is to be made whole for the loss of wages he or she has suffered. It is true that the judgment of the court of appeals in this case left the injured employee without full compensation for his lost pay. But that result was *not* based upon the allocation of damages rule applied. Rather, it was based upon the procedural circumstance, peculiar to this case, *that the plaintiff failed to appeal the limited trial court judgment against the employer.* In the view of the court of appeals, Bowen thereby waived any objection to that judgment, so that its amount could not be raised to cover the total backpay damages suffered.[14] As the employer concedes, however, "as a general rule" (Gov. Br. at 35) an employee in this type of case will recover full back pay damages however the allocation issue in this case is determined.

Nor is the question, as both the petitioner and the employer repeatedly intimate, whether or not unions are to be absolved entirely from paying *any* damages in cases similar to this one. Again, it is true that in this case no damages other than those based upon lost wages were

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[14] This brief does not treat with the question of whether the court of appeals erred in this respect, an issue raised as the second question presented in this case (Petition for Writ of Certiorari, at i). We do not add to the discussion of that issue, which is addressed by the other two parties in their briefs, because it affects only the rights of those two parties vis-a-vis each other, and cannot have any impact upon the amount of the judgment against the Union. Nor, since the questions are not presented here, do we treat with whether the finding of a breach of the duty of fair representation was proper and whether in a case such as this

proved by the plaintiff or assessed by the jury against either defendant. While attorney's fees of $20,000 were separately assessed by the trial court against the defendants (allocated $15,000 against the employer, $5,000 against the union), these fees and costs were not treated, as they should have been (*see Czosek* v. *O'Mara*, 397 U.S. 25, 29), as an aspect of the plaintiff's damages, and were consequently not submitted to the jury for determination as to amount and allocation between the defendants.[15]

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where the plaintiff seeks the equitable remedy of reinstatement and backpay a jury trial is available. To preserve our position we do note that we believe that the answer to both these questions is in the negative. On the jury trial point see *James* v. *Universal Manufacturing Corp.*, 107 LRRM 2858 (S.D. Miss., Aug. 28, 1981) citing cases.

[15] Instead, the trial court itself assessed attorneys' fees, on both a "bad faith" and a "common benefit" theory. (Pet. App. A19). The court did not explain at all how it arrived at its allocation of these fees between the defendants. Had the trial court applied the proper standard—*viz.*, requiring the Union to pay these fees "to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer" (*Czosek, supra*, 397 U.S. at 29)—it is likely that the Union's portion of the fee award would have been considerably higher.

While the employer appealed to the court of appeals the attorney's fee award, that appeal was based only on sovereign immunity grounds, and did not raise the allocation question. The court of appeals affirmed the fee award (Pet. App. A8) but did not discuss the question at all. The employer has not pursued its attack upon the attorneys' fees award in this Court. Consequently, no question concerning the proper allocation of attorneys' fees or litigation costs in a breach of the duty of fair representation/breach of contract cases such as this one is directly presented here.

Those courts which, like the court of appeals in this case, have refused to assess any loss-of-wages damages against unions in cases of this type have certainly not been prone to absolve unions of all financial responsibility. For example, in *Seymour* v. *Olin Corp.*, —— F.2d ——, 100 L.R.R.M. 2729 (5th Cir. 1982), the damages assessed against the union, which did not include any back pay, totalled nearly $40,000. Nor have damages been limited to attorneys' fees alone. *See, e.g., Scott* v. *Teamsters Local 377*, 548

Finally, despite the strong language used in the jury's special verdict (Pet. App. A22) and in the district court's opinion (Pet. App. A15, A18) to characterize the Union's conduct found to be in breach of its duty of fair representation, that breach consisted *solely* of a determination not to invoke arbitration as a means of attempting to overturn the employer's completely independent breach of the collective agreement based on the Union's good faith assessment, whether adequate or not, of the chance of success. The Union in this case did not instigate or participate in any way in the original breach of contract. Nor did the Union prevent or discourage a willing employer from remedying the breach, or impede in any regard the employee from pursuing his breach of contract remedy against the employer.[16] For reasons developed in this brief (*infra*, at pp. 33, 37-43), different allocation of damages rules may well be applicable where the union's wrong is of a different order than that here.

2. Once the apportionment of damages issue involved here comes into clear focus, it becomes apparent that this case does not present this Court with any question not previously decided. To the contrary, the problem of allocating damages in a hybrid "§ 301 and breach of duty suit" (*Vaca* v. *Sipes*, 386 U.S. 171, 197, n. 18) of this exact variety has been squarely addressed by this Court several times. The Court has developed its solution to that problem—one quite different from that advocated by both the petitioner and the employer in this case—on the basis of an understanding of the tripartite relationship between

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F.2d 1244 (6th Cir. 1977) (damages awarded for miscellaneous expenses incident to collecting from the employer on the breach of contract claim).

[16] *Compare, e.g., Harrison* v. *United Transportation Union*, 530 F.2d 558 (4th Cir. 1975) (union's deliberate action precluded employee from *any* breach of contract remedy against the employer); *Richardson* v. *Communication Workers*, 443 F.2d 944 (8th Cir. 1971) (union harassment of nonunion worker led to his discharge); *see Vaca* v. *Sipes*, 386 U.S. 171, 197 n.18.

the employer, the aggrieved employee, and the union diametrically opposed to that which underlies the arguments made by the petitioner and by the employer here. And that solution has, in turn, become an integral part of the intricate structure of § 301/duty of fair representation law as this Court has continued to explicate that law.

The upshot of twenty years of litigation in this Court, as we show in Part I of our argument, is this: Where there is a collective agreement, individual employees have substantive contract rights under that agreement that the employees can enforce in court under § 301. However, because of the national labor policy favoring peaceful, nonjudicial resolution of disputes between unions and employers, employers have a defense to § 301 breach of contract claims by individual employees where the individual failed to afford the contractually-established grievance-arbitration scheme an opportunity to resolve the contractual claim, and where the claim was in fact fairly resolved within that procedure. In turn, proof of the union's breach of its duty of fair representation serves to show that this justification for granting employers an exhaustion defense has not been met. On such proof the employee is entitled to pursue his ordinary breach of contract action against the employer, with a remedy fully vindicating that breach, just as in those instances where there is no contractual grievance system and the exhaustion defense is not available.

Based on the foregoing rules the Court in *Vaca* and its progeny has concluded that where the employer breaches the contract and where the union's only wrong is not properly pursuing the grievance, the employer as in any other breach of contract case is liable for backpay and no part of backpay damages are recoverable from the union. Unions that breach their duty of fair representation, however, *are* liable for damages flowing, not from

the breach of contract directly, but from the added costs to the employee in vindicating that employer breach.[17]

In part II of our argument, we show that not only do the authority and logic of this Court's decisions compel affirmance of the judgment below, but so do the equities. The employer's and the petitioner's assertion that the employer is not the cause of any lost earnings accumulated after there would have been a disposition through arbitration favorable to the employee is simply false. But for the employer's breach there would be *no* back pay liability, and the union has, in a case like the present, done nothing to cause that employer breach or to prevent the employer from repairing his breach. Indeed, it is the employer, and the employer alone, who has the power to reinstate the employee whom he has illegally discharged. To impose on the union the costs due to the employer's failure to reinstate at any time (unless the union has objected to the employee's reinstatement) would enable the employer to delay reinstatement to reduce the financial resources of the union, his adversary in collective bargaining.

The "policy" arguments for overturning the *Vaca* damage rule are likewise without merit. The deterrence

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[17] As the employer acknowledges (Gov. Br. 23-24 n.13), in addition to the Fourth Circuit, the other courts of appeals that have considered the damages apportionment issue presented here have read *Vaca* and its progeny to state the governing rule as we state it in the text. See *Seymour v. Olin Corp.*, ——F.2d ——, 109 LRRM 2728 (5th Cir. 1982); *Milstead* v. *International Brotherhood of Teamsters*, 649 F.2d 395 (6th Cir.), cert. denied, —— U.S. —— (October 13, 1981); *Holodnak* v. *Avco Corp.*, 514 F.2d 285, 287 (2d Cir.), cert. denied, 400 F.2d 877 (1975) affirming on this issue, 281 F. Supp. 191, 205 (D. Conn. 1974); *Richardson* v. *Communication Workers*, 443 F.2d 974 (8th Cir. 1971); *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877 (1970); but cf. *Clayton* v. *ITT Gilfillan*, 623 F.2d 563, 570-571 (9th Cir.) (dictum), reversed in part on other grounds *sub nom. Clayton* v. *Automobile Workers*, 451 U.S. 679 (1981).

rationale advanced would operate in a wholly haphazard manner, since there would be no correlation between the degree to which the union departed from the proper standard of behavior and the monetary cost imposed on the union due to the delay in reinstatement. On the other hand, the threat of monetary liability under the *Vaca* rule is ample to deter violations. Indeed, it is such that unions have more to fear even now, from screening unmeritorious grievances (and risking subsequent determinations that the grievances were meritorious and that the union had breached its duty in concluding otherwise) than from prosecuting all, or all not clearly frivolous, grievances through arbitration. To weight the scale any further would burden the operation of contractual grievance procedures.

Moreover, the petitioner and the employer are mistaken in their claim that "apportionment of Bowen's lost wages . . . will implement the bargain the parties struck . . . [or protect] legitimate expectations arising out of the collective bargaining agreement." Pet. Br. at 29; see also Gov. Br. at 29. The collective agreement here does not expressly provide for indemnification. The absence of such a provision where the law had provided for no such obligation unless the agreement so specifies belies that characterization of the parties' expectancies. Thus, to create such an obligation would defeat the parties' expectations and would conflict with the national labor policy which disfavors implying agreements not expressly reached by the parties. See, *e.g.*, *UMWA Health and Retirement Funds v. Robinson*, —— U.S. ——, 50 L.W. 4288, 4291 (March 3, 1982) and cases cited *id.* at n.21.

ARGUMENT

I

THIS COURT HAS ALREADY ESTABLISHED AND SEVERAL TIMES REAFFIRMED THAT THE EMPLOYER, NOT THE UNION, IS LIABLE FOR BACKPAY DAMAGES WHERE THE EMPLOYER BREACHES THE APPLICABLE COLLECTIVE AGREEMENT AND THE UNION IN NOT REMEDYING THE EMPLOYER'S CONTRACT BREACH, BREACHES ITS DUTY OF FAIR REPESENTATION

At common law, an employer who enters into an employment contract with an employee and who is alleged to have discharged that employee in breach of that contract is subject to suit by the adversely affected employee and, if the allegation is sustained, to being required by the court to pay the wages the employee has lost from the date of discharge until the date of reinstatement.

Equally, under § 301 of the Labor Management Relations Act, an employer who enters into a collective agreement with an exclusive bargaining representative that contains a "just cause" discharge clause and does *not* contain an arbitration clause and who is alleged to have discharged an employee without such cause is subject to suit by the adversely affected employee and, if the allegation is sustained, to being required by the court to pay the wages the employee has lost from the date of discharge until the date of reinstatement. *Smith* v. *Evening News*, 371 U.S. 195.

In general under § 301 an employer who enters into a collective agreement that contains both a "just cause" discharge clause and an arbitration clause and who is alleged to have discharged an employee without such cause is *not* subject to a suit by the adversely affected employee. The Court has provided an exception to this immunity when an employee is able to prove a breach by his exclusive bargaining representative of the duty of fair representation. *Vaca* v. *Sipes*, 386 U.S. 171. The

question presented here is whether, where that condition is satisfied, and the adversely affected employee is entitled to pursue his breach of contract allegation in court and that allegation is sustained, the employer, as in a common law suit and in a § 301 *Smith* suit, is required to pay the wages the employee has lost from the date of discharge until the date of reinstatement or whether the employer is in the better position of being required to pay only a portion of those lost wages.

Our basic submission is that *Vaca* and its progeny already decide that question and hold that the employer is in the same position in the three situations just outlined—in all three the employer *is* liable for lost wages from discharge through reinstatement (and in a *Vaca* case the union is liable for the employee's added expenses in perfecting his breach of contract claim occasioned by the union's breach of its representation duty to the employee).

A. The *Vaca* Court held that the employer is liable in full for *all* the damages flowing from his breach of contract, whether or not the union through the grievance arbitration procedure might have secured a remedy of the breach:

> Assuming for the moment that [the plaintiff] Owens had been wrongfully discharged, Swift's only defense to a direct action for breach of contract would have been the union's failure to resort to arbitration . . . and if that failure was itself a violation of the Union's statutory duty to employee, *there is no reason to exempt the employer from the contractual damages he would otherwise* [*viz.*, in an ordinary breach of contract case] *have had to pay.* [386 U.S. at 196 (emphasis supplied).]

Second, while leaving open the possibility that the union might be jointly liable for these same breach-of-contract damages where the union had "contributed" to *that* breach (*id.* at 197 n.18), the Court held that where the union's breach of duty is a failure to remedy the employer's independent breach of contract, "joint liability

for either [the employer's or the union's] wrong would be unwarranted." *Id.* at 197. Rather, relying on the basic proposition that the "employer . . . cannot . . . hide behind the union's wrongful failure to act . . . [and] the employee [is therefore] assured of direct recovery from the employer" (*id.* at 197), the Court saw no utility in terms of compensating the employee, and some unnecessary danger to the union, in making the union liable for *any* part of the employee's damages attributable to the employer's breach of contract. *Id.* at 197.[18] Those damages are, of course, the loss of wages calculated as they would be in any breach of contract action. Rather, unions are to be liable only for "damages caused by the . . . refusal to process the grievance" (*id.* at 197-198)—*viz.*, the injury to the employee which would not exist where as in *Smith* v. *Evening News*, *supra*, the collective agreement does not contain a grievance procedure which the employee could expect the union to pursue on his or her behalf.

That this is precisely what the Court meant in *Vaca* is confirmed—if confirmation is needed—first, by considering the facts of *Vaca* itself and, second, by looking at the next succeeding breach of fair representation case decided by this Court, *Czosek* v. *O'Mara*, 397 U.S. 25.

In *Vaca*, the only compensatory damages prayed for were those attributable to the company's breach of contract in the first instance and to the union's breach of duty in the limited sense that the union failed to prevent the injury from continuing. 386 U.S. at 195.[19] On the

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[18] "It could be a real hardship on the union to pay these damages," even if the union were given a right of indemnification against the employer . . ." *Id.* at 197.

[19] The petition for damages in *Vaca*, as the Court noted, pleaded damages of $6,500 per year in backpay. *Id.*, at 195. While the total compensatory damages awarded was $7,000, that, presumably, was because the petition asked for only that much, whether because of mitigation, or for some other reason. *See Vaca* v. *Sipes*, No. 114, October Term, 1966, Appendix, at 1-4. Because the basis for the $7,000 request was not clear on the *Vaca* record, and because punitive damages were also prayed for and awarded, it was not possible

facts of *Vaca*, it is evident that the employee might well have been reinstated before the court trial had the union gone forward to arbitration: The union's determination not to seek arbitration took place in early 1961, while the trial occurred in mid-1964. *Id.* at 175-176. Consequently, if the union had indeed breached its representation duty, the employee could almost surely have shown, given the opportunity, that the union's breach resulted in his being out of work longer than if the arbitration had been successfully completed.[20] Nonetheless, the *Vaca* Court held that "all or almost all of [the employee's] damages would still be attributable to his allegedly wrongful discharge" and not to the union's breach. *Id.* at 198.

Plainly, the *Vaca* Court did not regard the employer's responsibility for his own breach of contract as somehow evaporating entirely at the point at which the union might have succeeded in repairing the harm the employer indubitably caused. Rather, *all* backpay damages that accrue until the employer reinstates the employee, whether that reinstatement is voluntary, through the grievance procedure, or under court order, are "attributable to [the] . . . wrongful discharge" and, therefore, under *Vaca's* "governing principle," remain "the employer's share of the damages." *Id.* at 197-198.[21]

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to say with certainty whether "all" or only "almost all" the damages awarded were intended to reimburse the employee for lost wages. *Vaca, supra*, 386 U.S. aa 198.

[20] The Court held, as an alternative ground for reversing the damages award against the union, that there had been no breach of duty at all. *Id.* at 193-195. Contrary to the suggestions on the other side, it is, of course, well settled that "where a decision rests on two or more grounds, none can be relegated to the category *of obiter dictum.*" *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537.

[21] The petitioner and the employer in this case note that the National Labor Relations Board has issued orders in breach of duty of fair representation cases against unions imposing liability for backpay damages; in a few instances the liability has been joint and several, while in others the union has been held solely liable for the entire backpay loss suffered. Gov. Br. at 34 n. 21;

If more be needed, *Czosek*, *supra*, supplies a conclusive gloss on *Vaca's* remedial pronouncement: In *Czosek*, the Court held that duty of fair representation suits for failure to pursue available administrative remedies may be

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Pet. Br. at 35-40. *Vaca*, however, while noting that the NLRB had prior to that case found joint and several liability "where a union has affirmatively caused the employer to commit the alleged breach of contract" (*id.* at 197 n. 18) expressly rejected such an approach where "the Union played no part in [the employer's] alleged breach of contract," (*id.*). Thus, the recent NLRB remedial orders are squarely contrary to *Vaca* and of no weight.

Indeed, in rejecting the argument that Board jurisdiction in this area preempts court jurisdiction, *Vaca* expressly rejected as well the notion that there is any special NLRB expertise in the area of union breaches of the representation duty:

> The doctrine was judicially developed . . . and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities . . . [I]t can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the Steele decision. [*Id.* at 181.]

Consequently, the Board's views on the remedial question here would be entitled to no particular deference even if they were, as they were not, devised in the absence of a definitive contrary ruling by this Court.

While the foregoing is, we believe, dispositive, we note that the NLRB has never adopted the rule for which the employer and the petitioner in this case argue—*viz.*, that the employer is responsible for backpay damages until some hypothetical arbitration date, with the union liable thereafter. Instead, the Board has held the union liable from the date of discharge, with the employer jointly liable where the employer could be said to have "participated" in the union's breach of duty. This is such a plain misreading of *Vaca* that neither the petitioner nor the employer embrace it. Cf. *NLRB* v. *Local 485, IUE*, 454 F.2d 17 (2d Cir. 1972) (reversing the Board's backpay order because *Vaca*, at the least, holds that a union cannot be held liable for all the backpay damages in circumstances such as the present).

We note also that the NLRB's remedial orders in these cases have been constructed in a situation in which the Board had no power to order the employer to pay damages because the employer, whether or not it has breached the collective agreement, was not found to have committed an unfair labor practice. See, e.g., *Henry*

brought against the union even if the employer is not joined in the same lawsuit. The reason the employer was held not to be a necessary party is that unions in these circumstances, are, under *Vaca*, not responsible for damages for which the employer is "wholly *or partly*" (emphasis supplied) responsible. 397 U.S. at 29 & n.3. After reiterating *Vaca's* general "governing principle," the Court in *Czosek*, without dissent, made explicit that no part of backpay damages are recoverable from the union:

> Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer. [*Id.* at 29.][22]

The petitioner and the employer in this case wish away *Czosek* by claiming that it is limited to the Railway Labor Act context; the rule under the NLRA is different,

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J. Kaiser Co., 259 NLRB No. 1, 108 LRRM 1230; *United Steelworkers of America*, 223 NLRB 1184; *Local 2088 IBEW*, 218 NLRB 396. The Board has therefore proceeded as if its obligation were to devise a full remedy for the employee even though the primary instigator of the employee's injury, the employer, is not before the agency. The Board's remedial pattern in the breach of duty cases thus ignores *Vaca's* preservation of court jurisdiction over both the contract and union breach of duty issues, precisely because of the Board's inability to "remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it," (386 U.S. at 187).

[22] Contrary to the employer's suggestion, the Court's reference to "damages against the union for loss of employment" is in no way tantamount to recognition that "in an appropriate case the employer's liability for back wages would be shifted to the union." (Gov. Br. 18 n. 12). For, as we explained at the outset (pp. 12-13, *supra*), in cases of this type an employee may incur losses other than backpay; *Czosek* held the union liable for one species of such loss—*viz.*, the cost of added "difficulty and expense of collecting from the employer."

they contend. Pet. Br. at 18-20; Gov. Br. at 17 n.11. But *Czosek* itself relies squarely on *Vaca*, and nowhere suggests that the employees' ability under the RLA to pursue their own grievance was relevant to its explication of the *Vaca* rule. See also *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 n.13. Indeed, the Court in *Czosek*, far from basing its holding, as petitioner would have it (Pet. Br. at 19), upon the premise that "the employees' failure to press their own cases through the available grievance machinery barred a suit against the employer for breach of contract," expressly refused to review the court of appeals' ruling on whether that means of relief was available precisely because the damages assessable against the union would remain the same however that question was resolved. 397 U.S. at 30.[23]

B. In sum, the Court declared in *Vaca* and reaffirmed in *Czosek*, both a general rule for assessing damages in situations in which a union breach of the duty of fair representation and an employer breach of contract are essential elements of a plaintiff's case, and a specific application of the rule to situations identical to that here—*viz.*, to situations in which the union's breach consisted solely of a failure to obtain, through a grievance-arbitration procedure, reversal of the employer's independent breach of contract. The *Vaca* damages rule is not isolated from the entire corpus of § 301 law. The Court, as we now show, derived both the rule and its application from a set of premises quite contrary to those of the petitioner and the employer in this case: The requirement that the employee prove the union's breach of duty as a precondition to maintaining a breach of contract action against the employer is derived from national labor policy, and

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[23] In any event, the circumstance that the employee in *Czosek* had an administrative remedy against the employer which could be pursued independently of the union cannot possibly serve to distinguish this case. For, as a Postal Service employee, petitioner in this case could have appealed his discharge himself to the Civil Service Commission, and was expressly so informed. (J.A. 90).

that rule is *more protective of employers*, and less protective of individual contract rights, than common law principles of contract and of causation would suggest. It is, therefore, not surprising that the *Vaca* rule is also squarely contrary to that for which the petitioner and the employer argue.

We begin our recitation of the relevant history at the beginning with *Smith* v. *Evening News*, *supra*. *Smith* was, of course, the first case to hold that individual employees are entitled to bring suit under § 301 to enforce rights arising from the collective agreement between their employer and their exclusive bargaining representative. In *Smith*, "[t]here was no grievance arbitration procedure . . . which had to be exhausted before recourse could be had to the courts." *Id.* at 196, n.1. Consequently, the question whether individual employees, like unions and employers, are obliged to use any dispute-resolution mechanisms provided by the collective agreement prior to resorting to court enforcement was not decided in *Smith*. Justice Black objected to leaving this exhaustion question open, dissenting in *Smith* in part on the ground "the Court . . . should . . . decide clearly and unequivocally [that] an employee injured by the discrimination of either his employer or his union can file and prosecute his own lawsuit in his own way." *Id.* at 204-05.

Smith is of critical importance to this case for two reasons.

First, had *Smith* not overruled *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 348 U.S. 437, there would be no hybrid § 301 and breach of duty suit at all. Rather, breach of contract suits by individual employees against their employer if recognized at all would ordinarily have been decided in state courts, under state law, while duty of fair representation suits against unions, derived from the National Labor Relations Act or from the Railway Labor Act (e.g., *Electrical Workers* v. *Foust*, 442 U.S. 42, 46 n.8), would have remained federal causes of action. Whether or not employees could file breach of contract suits where the union had not

exhausted on their behalf grievance-arbitration procedures provided by the collective agreement would therefore have been decided by each state under its own law and not under the federal common law incorporating the goals of the federal labor policy. Consequently, "the overarching [federal] legislative goal . . . to facilitate collective bargaining and to achieve industrial peace" (*Foust, supra*, 442 U.S. at 47) might well not have been a central consideration when the exhaustion issue was decided, in all likelihood variously, by the state courts. Compare *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653. The result would likely have been that no exhaustion rule would apply, and that employers would be subject to suit for breach of contract by employees in discharge cases, without regard to whether the union has pursued the grievance-arbitration procedure on the same claim. Certainly, Justice Black understood that this would have been the common law rule in a jurisdiction whose law is not imbued with the presuppositions of the federal labor policy, pointing out that a non-exhaustion rule had been applied under Alabama state law in the *Maddox* case itself. 379 U.S. at 667 n.11 (Black, J., dissenting). If such were the rule, applying the ordinary principles applicable to assessing damages in a contract case, the employer would be held liable to the employee for all backpay damages once a breach of contract is established.

Second, under *Smith* itself, it is clear that if a collective agreement contains no applicable grievance-arbitration system, the employer can be sued for breach of contract, and is liable for the backpay damages in their entirety if the breach is established. *See Vaca, supra*, 386 U.S. at 183. Where there is no such procedure the union has no exclusive representation rights with regard to breach of contract claims and consequently no fair representation duty. For as the Court emphasized in *Vaca*:

> The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bar-

> gaining unit . . . . Since [the] landmark decision [in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192] the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law [386 U.S. at 182].

Thus, in a *Smith* case, where the collective agreement creates new rights not provided by the common law and the employee is entitled to invoke "traditional forms of redress" the union cannot be held liable for backpay; indeed the entire fair representation concept is irrelevant.

Moreover, in a *Smith* case the primary determinants of the backpay damages period are how long the applicable statute of limitations permits suit to be delayed after the breach has occurred, and how long the case takes to go to trial. The amount of backpay damages also depends upon whether the employer decides to end the accrual of potential liability by acceding at some point to the employee's demand for reinstatement or for another species of specific performance. For example, it is of course open to the employer in a *Smith* case to offer the employee reemployment upon filing of the lawsuit (or earlier). If this happens, no backpay damages are recoverable after that time, as long as there is no condition relating to retroactive backpay damages placed upon the offer of reemployment. 5 S. Williston, Contracts § 1359 (rev. ed. 1937).

The present species of cases differs from a *Smith* case in that the employer and the union have agreed in the collective agreement to a comprehensive grievance-arbitration procedure. In *Republic Steel Corp.* v. *Maddox*, *supra*, the Court faced the question left open in *Smith* whether such procedures provide *employers* a legal defense to a *Smith* action on the ground that the employee has not given the union and the employer the opportunity to address the alleged breach of contract through the grievance-arbitration procedure.

The Court in *Maddox* held that "individual employees wishing to assert contract grievances must *attempt* use of

the contract grievance procedure agreed upon by employer and union as the mode of redress." *Id.* at 652. As the Court later explained, this exhaustion rule was adopted "to protect the integrity of the collective-bargaining process and to further that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over the interpretation and application of collective-bargaining agreements." *Clayton* v. *Automobile Workers*, 451 U.S. 679, 687. In other words, *Maddox* imposed the exhaustion rule to strike a balance between the individual rights recognized in *Smith* and the collective interests of employees generally in a well-functioning collective bargaining system. *See Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 563-64. In these terms, the decision in *Maddox* was that while individual employees have a right under *Smith* to sue their employer directly for breach of contract, those employees are permited to do so only if the collectively-established system is given a chance to work and fails to do so.[24]

Again, absent the *Maddox* exhaustion rule, suits of the present variety would not exist at all; employees who believe that they have been injured by an employer's breach of contract would be free to sue, and to recover damages from the employer on the same basis as in a *Smith* situation. Certainly on that supposition the employee's § 301 action against the employer would be the sole means for recovering the backpay damages the employer caused by his breach of the contract.

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[24] Justice Black once more vigorously dissented in *Maddox*, protesting that

> Maddox has a justiciable controversy. He has not agreed since the controversy arose, or even for that matter before it arose, to arbitrate it, and so he could not have the doors of the courts shut in his face. Nor do I believe that he or any other member of the union should be treated as an incompetent unable to pursue his own simple breach-of-contract losses. I cannot and do not believe any law Congress has passed provides that when a man becomes a member of a labor union in this country he thereby has somehow surrendered his own freedom and liberty to conduct his own lawsuit for wages. [*Id.* at 670.]

The question in *Vaca*, seen in this light, was whether the fact that *Maddox* grants employers an exhaustion defense to most § 301 breach-of-contract actions brought by employees fundamentally alters the cause of action in those instances in which the defense is not available, by making the union rather than the employer responsible for a large portion of the backpay damages the employer caused by breaching the collective agreement in the first place. This question was addressed in *Vaca* first as a conceptual matter and then as it specifically affects the appropriate damages remedy against unions. We have already discussed (pp. 19-24) the latter aspect of the opinion; to round out the analysis we now put the damages portion of *Vaca* in its context.[25]

The first question in *Vaca* was whether duty of fair representation claims against unions must be litigated before the National Labor Relations Board rather than in court. That question was answered in the negative in large part because of

> some intensely practical considerations which . . . emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. § 301 charging an employer with a breach of contract. [386 U.S. at 183.]

In developing this point, the Court reviewed *Smith* and *Maddox*, noting that where there is a grievance-arbitration

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[25] The petitioner and the employer focus in their briefs on the damages aspect of *Vaca*, ignoring the conceptual underpinnings for the Court's pronouncements on the remedy question which had been set out earlier in the opinion. Gov. Br. at 14-15; Pet. Br. at 15-16. Their tactic, it appears, is that by approaching *Vaca's* discussion of remedies in a theoretical vacuum they will succeed in creating the impression that the opinion is ambiguous as applied to the present situation. It suffices to say that when the damages discussion is read in light of the earlier explication of the relation-

procedure "the employer may well defend [a § 301 breach of contract claim] on the ground that the exclusive remedies provided by [the] contract have not been exhausted," and that *Maddox* held that the defense will be successful unless "the employee has at least attempt[ed] to exhaust exclusive grievance and arbitration procedures . . ." *Id.* at 184. As the *Vaca* Court saw it, "[t]he problem . . . is to determine under what circumstances the individual employee may obtain judicial review of his breach of contract claim despite his failure to secure relief through the contractual remedial procedures." *Id.* at 185. Thus, the *Vaca* Court perceived the issue as being one of defining the circumstances in which no exhaustion defense would be available to an employer in a *Smith*-type breach of contract action, and thus as an issue whose logic is that the employer, as in *Smith*, is liable in court for damages on account of his breach.

Two possible answers to the problem posed were explored in *Vaca*: The first, advocated by Justice Black in dissent (*id.* at 203 et seq.) and alluded to by the *Vaca* concurring opinion (*id.* at 200 & n.3), would have permitted employees to maintain their breach of contract action against the employer as long as they *asked* the union to pursue the grievance procedure on their behalf. As Justice Black viewed the matter, to make the employee's right of action against the employer dependent upon the union's breach of duty in pursuing that procedure permits the employer

> having breached its contract, [to be] allowed to hide behind and [to be] shielded by the union's conduct. [I]t should not make one iota of difference, as far as the "unrelated breach of contract" by Swift is concerned, whether the union's conduct is wrongful or rightful. [*Id.* at 205 (Black, J., dissenting).]

Had this view prevailed, the employer's exhaustion defense in employee suits for breach of contract would have

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ship of the § 301 breach of contract suit and the breach of duty of fair representation suit, it is perfectly lucid and specific.

been available in markedly *fewer* instances than it is now. And, since no wrongful action against the union would have had to be proved, there can be no doubt that the totality of backpay damages for the employer's breach of contract in the suits in which the exhaustion defense would not be available would have been assessed against the employer.

The *Vaca* majority, however, rejected the dissent's approach to the exhaustion question. Instead, the majority held that "a defense based upon the failure to exhaust contractual remedies is available to the employer unless the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Id.* at 186. As the Court later explained, this alternative furthers the congressional policy favoring "the settlement of disputes through mutual discussion and arbitration" between the employer and the union, while assuring that the parties to the collective agreement cannot entirely "subordinate[] the interest of an individual employee to the collective interests . . ." *Hines* v. *Anchor Motor Freight*, 424 U.S. at 563, quoting *Vaca*, *supra*, 386 U.S. at 182. In so doing the *Vaca* Court was quite aware that for perfectly legitimate reasons unions typically take relatively few grievances to arbitration. The Court cited statistics demonstrating this fact and proceeded on the understanding that a high settlement ratio is essential to maintaining a properly functioning private dispute resolution system. 386 U.S. at 192, n.15.

Thus, the *Vaca* Court concluded that the national labor policy erects a higher barrier than that proposed by Justice Black to employees who seek to hold their employer judicially responsible in damages for a breach of contract, by requiring such employees to prove a breach of the union's duty of fair representation as a condition precedent to proceeding with their case against the employer. The Court was not, as the petitioner and the employer in this action would necessarily have it, further disagreeing

with the *Vaca* dissent by altering the character of the § 301 *Smith* lawsuit when that suit is allowed to go forward:

> The employee *as part and parcel of his § 301 action* [will have] to prove [a breach of the duty of fair representation] by the union . . . The court is free to determine whether the employee is banned by the actions of his union representative, and, *if not, to proceed with the case.* [386 U.S. at 186-187.]

The *Vaca* majority was quite aware of the objection that because "the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement" it is somehow unfair to permit a *Smith*-type suit against the employer. *Id.* at 185. The Court, however, rejected the notion that the employer's possible lack of responsibility for the union's breach makes it fundamentally inequitable to permit the employee to pursue his or her *Smith* action where the condition precedent to doing so is established. For, as the Court emphatically affirmed, the employer in this situation is no innocent bystander. Rather, since

> the employer has committed a wrongful discharge in breach of that agreement . . . we [do not] think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. [*Id.* at 185-186.][26]

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[26] That the *Vaca* Court viewed the problem as one of determining the limits of the exhaustion defense in a *Smith* action is confirmed by considering the other "circumstance in which an employee should not be limited to the exclusive remedial procedures established by the contract." *Id.* at 185. That circumstance is where "the conduct of the employer amounts to a repudiation of those contractual procedures." *Id.* The Court noted that in that situation, "the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense." *Id.* Obviously, an employer "estopped by his own conduct" could not shift onto a third party responsibility for part of the damages flowing from his breach of contract. Yet, the Court saw the

Vaca also recognized, however, that "in at least some cases" (*id.* at 187) the union's breach of the duty of fair representation would be shown to have "enhanced" the employee's damages beyond that available against the employer in a *Smith* action. For example, an employee, as we have noted (pp. —, ——, *supra*), may be able to prove—although the employee did not do so either in *Vaca* or in this case (see n. —, *supra*)—that the failure of the union to provide free representation in the contractual procedure required the employee to make expenditures to perfect his contract claim he otherwise would not have been required to make. The Court also noted that there are situations in which the union's breach can be said to have "contributed" (*id.* at 187) to the breach of contract as, for example, "where a union has affirmatively caused the employer to commit the alleged breach of contract," (*id.* at 197 n.18). Again, neither *Vaca* nor this case presents such a situation, for here as in *Vaca* "the Union played no part in [the employer's] alleged breach of contract and [the employer] took no part in the Union's alleged breach of duty." *Id.*

Thus, *Vaca's* basic proposition that the employer has a broad but *not unlimited* defense to a *Smith* action where the collective agreement establishes an exclusive grievance procedure is central to its discussion of remedies in hybrid § 301/breach of duty actions. Read in light of that proposition, there is no ambiguity whatever in the Court's pronouncement in *Vaca* that "[t]he governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each . . . [so that] damages attributable solely to the employer's breach of contract should not be charged to the union." *Id.* at 197. For, once the "shield"

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present situation as simply "another situation when the employee may seek judicial enforcement of his cont tual rights" (*id.*), with the same consequences as if the wrongful behavior which resulted in waiving the exhaustion defense in a breach of contract action against the employer was the employer's own.

of the exhaustion defense is removed and the employee's right to maintain his *Smith* action reinstated, the employee is in precisely the same situation as he would have been if the views of the *Vaca* dissent had prevailed and there had been no need to establish a breach of the duty of fair representation in the first place. At that juncture the only harm caused the employee by the union relates to the cost of self-representation, and not to the loss of wages, which are, absent a viable exhaustion defense, fully recoverable from the employer under *Smith's* reasoning.

C. Since deciding *Vaca* and *Czosek* the Court has decided four additional hybrid § 301/breach of duty cases of the *Vaca* variety. *Hines, supra; Foust, supra; United Parcel Service* v. *Mitchell*, 451 U.S. 56 and *Clayton, supra.* Each of these cases was built to some degree upon *Vaca's* basic premises, and assumed the applicability of the allocation of damages rule of *Vaca* and *Czosek.*

In *Hines*, for example, the question was whether a § 301 breach of contract action against an employer may go forward where there is an arbitration award in the employer's favor, but the union has breached its duty of fair representation by the manner in which the union presented the case to the arbitrator. After reviewing the cases beginning with *Smith* in much the same way as we have done (424 U.S. at 562-568), the Court rejected the view that "even though under *Vaca* the employer may not insist on exhaustion of grievance procedures when the union has breached its representation duty . . . when the procedures have been followed and a decision favorable to an employer announced, the employer must be protected from relitigation . . . ." 424 U.S. at 567.

Beginning from the premise established in *Vaca* that "[t]he union's breach of duty relieves the employee of an express or implied [exhaustion] requirement" (424 U.S. at 567), *Hines* holds that "the contractual protection against relitigating an arbitral decision [also does not bind] employees who assert 'a union breach of duty.'" *Id.* at 569. Thus, once again the Court viewed the mat-

ter as one of determining the limits of the exhaustion defense in an employee's suit against his employer. And, once again, the Court directly addressed the argument that this approach is somehow unfair to employers, giving the same answer as in *Vaca*:

> It was [the employer] that originated the discharges for dishonesty. If those discharges were in error, [the employer] has surely played its part in precipitating this dispute. [*Id.* at 569.][27]

Similarly, in *Foust*, *supra*, which holds that punitive damages are not available in breach of representation duty cases the Court stated "Because an employee can recover in full from his employer for its breach of contract, . . . a union which [simply] fails to process a grievance predicated on that breach cannot be held liable for damages attributable to the employer's conduct . . . ." 442 U.S. at 49; see also *id.* at 57 (Blackmun, J., concurring in the result).

Thus, the *Foust* majority recognized that *Vaca* had established the two remedial propositions for this type of case discussed above: First, that employers remain liable for all damages that would not have occurred but for their breach of contract; and, second, that "to limit union liability" where full compensation is available to employees, unions are not jointly liable for any portion of those damages. See also *United Parcel Service* v. *Mitchell*, *supra*, 442 U.S. at 62-63; *Clayton*, *supra*, 451 U.S. at 687-689, 696.

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[27] Justice Stewart, it is true, filed a concurring opinion in *Hines* suggesting that an allocation of damages rule similar to that advocated here by the employer and the petitioner could be squared with the holding on the merits. *Id.* at 572-73 (Stewart, J., concurring). For present purposes, we note two salient points: First, Justice Stewart's views were not joined by any other member of the Court; and, second, Justice Stewart's concurrence was limited to the situation in which the grievance had actually gone to arbitration, he did not suggest overruling *Vaca* and *Czosek* in the precise circumstances pertinent both in those cases and here—viz., where the employer's action had not in any sense been sanctioned by a neutral, outside party. See also part II of our argument *infra*.

D. Thus, the petitioner and the employer are, in this case, necessarily asking for reconsideration of the very foundations of the intricate structure the Court has evolved regarding suits by individual employees against employers under § 301. Any doubt that this is so is dispelled by the heavy reliance placed by the petitioner upon an article which, in one sense, does support his view on the remedy question, Feller, *A General Theory of the Collective Bargaining Agreement*, 71 Calif. L. Rev. 663 (1973). *See* Pet. Br. at 26. Professor Feller, however, in no way disagreed with the understanding of *Vaca* we have developed; indeed, his own explanation of that case is quite similar to ours. Feller, *supra*, 61 Calif. L. Rev. at 817. Rather, "the principal burden of [his] Article is that [the *Vaca*] approach is simply wrong." 61 Calif. L. Rev. at 817. Indeed, in Professor Feller's view both *Vaca* and *"Smith* v. *Evening News Association* . . . [were] wrongly decided." 61 Calif. L. Rev. at 845. And, in particular, Professor Feller's disagreement with *Vaca* on the remedy problem goes far beyond the issue involved in this case. For Professor Feller suggested an allocation of damages similar to that argued for by the petitioner and the employer here only as part of a general rule that, contrary to *Vaca* (386 U.S. at 196), would preclude courts from deciding the merits of § 301 breach of contract cases of this variety *at all*, limiting the remedy in this regard to an order to proceed to arbitration. 61 Calif. L. Rev. at 813 *et seq.* With all deference to Professor Feller, we suggest that both reason and the considerations of doctrinal stability and judicial economy recognized in the doctrine of *stare decisis* call for reaffirmance of the § 301/breach of duty rules now firmly in place and not for the radical restructuring of those rules suggested in his article.[28]

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[28] In *Vaca*, the union urged that in a hybrid § 301/breach of duty suit, "an employee be restricted . . . to a decree compelling the employer and the union to arbitrate the underlying grievance." *Id.* at 196. The Court, however, determined that while "an order compelling arbitration should be viewed as one of the

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IN PRINCIPLE WHERE THE UNION BREACHES ITS REPRESENTATION DUTY IN FAILING TO RECTIFY THROUGH THE CONTRACTUAL GRIEVANCE-ARBITRATION PROCEDURE AN EMPLOYER'S BREACH OF CONTRACT, THE UNION SHOULD NOT BE REQUIRED TO PAY A PORTION OF THE RESULTING BACKPAY DAMAGES

Even viewed as an original proposition—which, as we have shown, it decidedly is not—absolving employers from the responsibility for backpay damages under the cir-

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available remedies . . . we see no reason inflexibly to require arbitration in all cases." *Id.*

As Professor Feller suggests, the allocation of damages rule for which the employer and the petitioner in this case argue, might make sense if *both* the arbitration remedy ruling and the apportionment of damages ruling of *Vaca* were reconsidered, along with their underpinnings in *Smith*. If the conception that the collective agreement as such creates enforceable rights in individual employees were abandoned, the view could be substituted that "[t]he collective agreement is not a contract between the employer and any employee and neither may bring suit against the other for its breach." Feller, *supra*, 61 Calif. L. Rev. at 773. In that event, it might well follow, for the reasons Professor Feller suggests (*id.* at 792-805), that the promise to respect the grievance-arbitration procedure would be inseparable from the collective agreement's substantive promises, so that the *only* judicially enforceable promise where arbitration has not occurred would be the promise to arbitrate, whether in a suit brought by the union or in a suit brought by an employee who can prove that the union's failure to arbitrate was in breach of its representation duty. *Id.* at 817. And in that event, the rule that the employer's liability for retroactive backpay should not be enlarged by the delay in the arbitration proceeding might follow as well. *Id.* at 821.

While we do not agree with Professor Feller's ultimate conclusions, there can be no doubt that his approach is far more responsible than the suggestion put forward by the employer and the petitioner here—*viz*, that the *Vaca* damage allocation rule alone should be altered while its underpinnings remain in place. For, as we have shown, that rule is an integral part of the interrelated set of rules governing § 301/breach of duty suits, and, on the hypothesis that the Court has erred in constructing that body of law,

cumstances of this case would be illogical, inequitable and inconsistent with national labor policy. We do not dispute petitioner's point that backpay may be a proper measure of the injury caused by a breach of duty even though the party held liable had not made a promise of wages in return for services in the first instance. Pet. Br. at 31.[29] But that commonplace does not advance consideration of the question presented here—whether the employer or the union is liable for that backpay. And as we now show, the *Vaca* rule is more consistent with basic principles of causation, with equity, and with the whole of the national labor policy than is the alternative argued for by the petitioner and the employer.

A. The petitioner and the employer both begin their arguments of logic, equity and policy from the assertion that the employer is not the "cause of any lost earnings accumulated after the point at which a favorable arbitral decision or other grievance procedure would have reinstated or otherwise compensated the employee." Gov. Br. at 25-26; *see also* Pet. Br. at 21, 24. This assertion is simply false. If the employer in a case such as this had not, in breach of contract, fired the plaintiff-employee, that employee would still be working for the employer and *no one* would be required to reimburse the employee for lost wages accumulated either before or after he might have been reinstated through arbitration. Consequently, the employer indubitably "causes" the employee's loss of wages from the date he was fired to the present, whether or not the union's breach of duty may sensibly

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Justice Jackson's observation in *Michelson* v. *United States*, 335 U.S. 469, 486, is very much in point: "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."

[29] Thus, if the opinion below be read as holding that unions are *never* responsible for backpay damages in duty of fair representation cases, even jointly and even if the union itself demanded the discharge or otherwise provoked the employer to breach the contract, it may well be in error.

be considered a cause as well of his backpay damages for the hypothetical post-arbitration period.

Moreover, it is also false, or at least seriously misleading, to assert in a case such as this that because the union failed to pursue the grievance-arbitration procedure to its conclusion, the union has "caused" the employee to be out of work for the period beyond the hypothetical arbitration date (hereafter "post-arbitration period"). In this case the Union did nothing at any point to prevent the Postal Service from reinstating Mr. Bowen had the Service wished to do so. In this sense, "there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated at an earlier date." *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir. 1970).[30] Consequently, the Union may be said to be a cause of the employee's loss of earnings for the post-arbitration period only in the attenuated sense that the union did not stop the employer from persisting in his breach of contract. Thus, as the Fifth Circuit recently put it in refusing to levy backpay damages against a union in a case such as this, to shift post-arbitration period backpay damages for which the employer would otherwise be liable to the union would be to sustain an employer's "protest[] to the Union . . . [that] you should be liable for all damages flowing from my wrong from and after a certain

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[30] This is quite obviously the sense in which the *De Arroyo* Court intended its statement to be read. For, in that case, the union failed to process grievances with respect to firings in September 1963 and April 1964; suit was not filed until November 1965; and the trial was not conducted until February 1968. Feller, *supra*, 61 Calif. L. Rev. at 671. The jury in *De Arroyo* was in fact instructed in a manner similar to the jury in this case—*viz*, that the union is liable for any "increases in loss of earnings" because of the union's failure to process the grievance in a timely manner (*id.*) and did so apportion the damages. *Id.* at 671-672. Thus, there was not only "evidence" but a jury finding which would have supported apportionment on the theory advocated by the petitioner and the employer in this case. But the First Circuit held, correctly, that the theory is inconsistent with *Vaca*.

time, because you should have caught and rectified my wrong by that time." *Seymour* v. *Olin Corp.*, *supra*, 109 LRRM at 2737.[21]

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[21] The aptness of this insight is, we believe, shown by a common law analogy which, while imperfect, is more in point than any other: The rule that an individual employee may bring suit against his or her employer for breach of contract if and only if the union has breached its duty of fair representation in determining not to pursue the grievance on the employee's behalf is similar to the principle that the beneficiary of a trust may sue to enforce a contract entered into on his or her behalf by the trustee if and only if the trustee "improperly refuses or neglects to bring an action against the third person." Restatement (Second) of Trusts, § 282; 3 Scott, Trusts, § 282.1. *See*, discussing the similarities between such a lawsuit and the present one, Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 652 (1956); *Jenkins* v. *Wm. Schluderberg-T.J. Kurdle Co.*, 217 Md. 556, 144 A.2d 88 (Md. Ct. App.). Both the Cox article and the *Jenkins* opinion were cited approvingly in *Vaca*, although the trust analogy was not alluded to. 386 U.S., at 186 n.11, 191. In such a suit, proof that the trustee's failure to protect the beneficiary's contract right was in fact improper is necessary (Scott, *supra* § 282.1 at 2340), but, if that condition is established, the original debtor is responsible in full for the debt, and the trustee is responsible *only* "for a surcharge for such loss as result[ed] from his failure to act." Scott, *supra* § 177 at 1424.

As the analogy suggests, that the union has breached a separate duty to the employee to protect the employee's contractual rights in no way serves in itself to *absolve* the employer of responsibility for the employer's own contract breach. Nor, under the basic rule of *Vaca*, does the union's breach deprive the employee of his contractual rights or impare those rights. The union's breach of duty, as *Vaca* holds, therefore simply makes it proper to "surcharge" the union for the employee's added costs in perfecting his claim.

The only other at all similar common law analogy concerns the situation in which there are successive torts—or, as in this instance, a breach of contract and a tort. In that circumstance, the original wrongdoer is ordinarily recognized as the cause of the entire wrong, and as liable for all damages flowing from that wrong, even where the second tortfeasor has breached a duty to the plaintiff which, if fulfilled, would have limited his or her injury. *See* Corbin, Contracts § 998 (defendant liable for total harm caused by breach of contract as long as "the defendant's breach was 'a substantial factor' in causing the injury"); Restatement (Second) of Torts, § 433A, § 441, § 452, § 457. In particular, except under

B. The same conclusion—that the *Vaca* rule is sound—follows if the problem is looked at not in terms of legal concepts of "cause" but as a matter of equity alone. There is no unfairness to employers in the rule that they remain liable to the individual employee for backpay damages as in a *Smith* case despite the existence of a contractual grievance-arbitration procedure which, if pursued to conclusion by the union, might have remedied the employer's wrong sooner than the judicial system remedies that wrong. As we have pointed out, the employer in such a situation *always* has the power, as in

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unusual circumstances, "the failure of a third person to prevent harm to another threatened by [a third person's] negligent conduct is not a superseding cause of such harm" absolving the third person from liability. Restatement (Second) of Torts, § 452. Thus, even on a tort analogy, the causation theory propounded by the employer and the petitioner does not stand up, and the union would be at most jointly, not solely, liable for the period during which the union could be considered to have contributed, albeit remotely, to the employer's loss of wages.

The Court in *Vaca*, as we have explained, explicitly considered and rejected the joint liability possibility. *See* pp. 19-20, *supra*. The reason may well have been the additional complications such a rule would engender: if the tort analogy were adopted, the courts would be faced with claims for contribution and for indemnity, claims with which federal courts are ill-equipped to deal. *See* W. Prosser, *Law of Torts* (4th ed. 1971), pp. 305-313; Restatement (Second) of Torts, §§ 886A-886B; *cf. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 643 (1981) (even where, as in § 301 and in the Sherman Act, Congress has empowered the federal courts by statute "to create governing rules of law . . . [i]t does not necessarily follow . . . that Congress intended to give courts as wide discretion in formulating . . . the kind of relief sought through contribution.") And, in most instances, as *Vaca* suggested, any indemnity right under these circumstances would in any event normally lie in favor of the union rather than the employer, if the usual tort principle were applied. *See* W. Prosser, *supra*, at 312 ("where one tortfeasor, by his active conduct, has created a danger to the plaintiff, and the other has merely failed to discover or to remedy it," indemnity will lie in favor of the second tortfeasor.) Thus, the *Vaca* rule reaches the same ultimate result in most instances as a tort joint liability approach without the litigation complication such an approach entails.

the situation in which there is no arbitration provision, of cutting off his exposure to future backpay damages at any point by, for example, offering an aggrieved discharged employee reinstatement. Indeed, the existence of a grievance procedure, even if not pursued to its completion by the union, will ordinarily enhance the employer's ability to respond in this manner, for, unless the union fails to file even a first step grievance, the procedure will assure that the employer has notice prior to the filing of suit that the employee *is* aggrieved and believes his discharge to have been unjust.

On the other hand, a rule which permits the employer to make the union an insurer of the employer's liability for the post-arbitration period would be seriously inequitable to the union. For, as this Court stressed in *Clayton*, without the employer's concurrence, "the union can neither reinstate [a discharged employee] in his job . . . nor reactivate his grievance." 451 U.S. at 691. As a result, the union, in contrast to the employer, does not have the power to cut off liability for backpay damages, even if the union agrees through internal union review procedures such as those examined in *Clayton* or otherwise, that the initial decision not to pursue the grievance, or to pursue it in a given manner, had indeed been in breach of its duty to the employee.

In *De Arroyo*, *supra*, for example, the union did ask the company to process the employee's grievance which was the subject of the suit. The company refused to do so. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, *supra*, 61 Calif. L. Rev. at 669. As a result, that union would have been liable, under the rule propounded by the petitioner and the employer here, for backpay damages for two years *beyond* the time the union sought to redress its failure to seek arbitration and was prevented by the employer from doing so. The employer, on the other hand, can always, *without* obtaining the union's concurrence, cut off any escalation of backpay damages by simply offering rein-

statement. One practical consequence is that if the rule of *Vaca* and *Czosek* were abandoned, employers would have an incentive *not* to settle cases of this type, either by agreeing to arbitrate despite the expiration of time limitations or by reinstating the employee. For, the employer's potential liability will be fixed as of a date already past, while refusing to settle could weaken the financial resources of the employer's adversary in bargaining, the union.

That the union's liability for damages would, under the allocation rule argued for by the employer and the petitioners, continue to mount without relation to the particular wrong perpetrated by the union is more than a coincidental effect of the tripartite relationship underlying a case of this sort. Rather, this effect is a corollary of the fact that the union cannot in any meaningful sense be said to be responsible for the employee's lack of employment in the post-arbitration period.[23]

C. The question, then, becomes whether there is some overriding policy consideration that could possibly justify allowing employers under the present circumstances to escape responsibility for "the natural consequences" of their breach of contract (*Vaca, supra*, 386 U.S. at 186) after a certain time, despite the inequities such a rule would create. The petitioner and the employer in this case, while not posing the issue in this manner, suggest two sets of policy considerations they claim to be pertinent to the problem. The first is "insuring future Union adherence to its duty of fair representation" (Pet. Br. at 28), and the second is promoting the national labor policy favoring free collective bargaining generally, and the implementation of agreements to settle disputes through arbitration particularly.

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[23] These equitable considerations suggest, at a minimum, that a union should not be held liable for backpay damages unless the employer offers reinstatement or reactivation of the grievance and the union obstructs the implementation of the offer.

1. The union's duty of fair representation is derived, of course, not from the collective agreement or even from the collective bargaining relationship between the union and the employer but, instead, from the statutory provisions designating unions selected by a majority of the members of a bargaining unit as the exclusive representative of the employees in that unit. See *United Parcel Service* v. *Mitchell*, *supra*, 451 U.S. at 62; *Foust*, *supra*, 442 U.S. at 47-48. As such, the duty runs *not* to the employer but to the employees in the unit. Thus, the union's duty of fair representation to employees is at least an unlikely source from which to derive a responsibility running from the union *to the employer* to absorb a portion of the backpay damages flowing from the employer's breach of contract.

Further, the only sense in which it has been suggested that such a court-imposed indemnity obligation might promote the union's observation of its representation obligation is via the *in terrorem* effect which the specter of a backpay damage award might have upon unions contemplating whether or not to pursue particular grievances further. There are at least three major reasons why this consideration cannot justify the liability shifting device here propounded.

First, as just observed (at pp. 42-43, *supra*) the amount of the backpay awarded under the theory the trial court in this case applied bears no relationship to the magnitude of the union's wrong, or the degree of the union's intransigence. Rather, the potential damages will continue to mount regardless of what the union does after its initial breach of duty. And, those damages will continue to mount to the same extent whether the union's original determination not to pursue the grievance was motivated by animosity against the grievant or, instead, is later characterized by a court or by a jury as "arbitrary" or "perfunctory" (*Vaca*, *supra*, 386 U.S. at 191) on the ground that in hindsight the care the union took in determining whether to pursue the grievance is deemed

to have been insufficient. Consequently, while, like punitive damages awards, "the threat of large [loss-of-wages] sanctions would likely affect unions' willingness to pursue individual complaints" (*Foust, supra*, 442 U.S. at 48), that deterrent effect would flow, as in the case of punitive damages, from the very arbitrariness and unpredictability of the potential liability when viewed from the perspective of the union decision maker. The result would be similar to that which led the *Foust* Court to reject the availability of punitive damages in duty of fair representation cases—*viz.*, that "even those unions confident that most juries would hold in their favor could be deterred . . . from taking actions clearly in the interest of union members." *Id.* at 52.[33]

Second, the deterrence rationale fails because there is a strong countervailing consideration, stressed in both *Vaca* and *Foust*: The effective functioning of the contractual grievance machinery demands that unions not be unduly discouraged from settling grievances. *Vaca, supra*, 386 U.S. at 191-193; *Foust, supra*, 442 U.S. at 51:

> Union supervision of employee complaints is essential to the proper functioning of the collective-bargaining system . . . Without these screening and settlement procedures, the Court found [in *Vaca*] that the costs of private dispute resolution could ultimately render the system impractical.

That the duty of fair representation standard is in theory a reasonable one is not, as *Foust* shows, an adequate reason for imposing a potential deterrent so disproportionate to the wrong as to skew the decisionmaking process.[34]

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[33] In this case, of course, there was no contention, much less a finding, that any union officer acted out of animosity toward Bowen. Notwithstanding the jury's finding to the contrary, and even more clearly than in *Foust*, the facts in this case do not, as a matter of law, support the finding that the union acted "maliciously or recklessly, or in callous disregard" of Bowen's rights.

[34] The employer's discussion of this consideration proceeds on the premise that "arbitrary, discriminatory or bad faith conduct *should*

Third, as we noted at the outset of this brief (at pp. 12-13, *supra*), the rule of *Vaca* and *Czosek* provides

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be deterred". Gov. Br. at 31. But, as applied in practice, the *Vaca* standard is not so limited. Unions are found to breach their representation duty when the union is, at worse, negligent, and often, when the union is determined after the fact to have been mistaken in its good faith judgment on the merits of a grievance. See Gov. Br. at 31, n. 19. The facts of several of the post-*Vaca* cases in this Court graphically confirm this trend:

(1) In *Hines, supra*, the union *did* take the grievance to arbitration; its breach of duty consisted of failing to discovery by investigation that the hotel clerk, rather than the discharged employees, was responsible for a discrepancy between the charges shown on the hotel registration card and the employees' reimbursement request. The employer, however, had also failed in its investigation to discover the hotel clerk's dishonesty and, until a year after the arbitration was concluded, the employees and their atorney also failed to uncover any proof in this regard. Thus, the district court's characterization of the union's actions in *Hines* as "at most bad judgment . . . insufficient to prove a breach of duty" (424 U.S. at 559), seems quite accurate. To the extent the employer in *Hines* had a complaint on fairness grounds (see *id.* at 572-73) (Stewart, J., concurring), that complaint should have been directed at the court of appeals' reversal on the union breach of duty issue, allowing the contract claim to be retried on the merits even though the original arbitration was in no way fundamentally flawed, rather that at the allocation of damages rule.

(2) In *Foust, supra*, the union's breach consisted of failing to file a timely grievance, a failure stemming from the fact that the employee as was his right under the agreement retained separate counsel and that counsel did not request that the union file the grievance until the fifty-second day of a sixty-day limitations period, and from the union's "simply following its standard operating procedure" (442 U.S. at 60) (Blackmun, J., concurring) in insisting on an individually filed grievance.

(3) In this case, the decision not to proceed to arbitration *was* made on the merits, on the ground that, given the circumstances, it was unlikely that the union could prevail. The *only* complaint the employee has raised about this decision is that it was "perfunctory" in the sense that it was made too quickly. Clearly the effect of requiring a union under the present circumstances to bear a portion of the loss of wages damages, attributable to the employer's breach of contract, and not

adequate incentive for unions to pursue potentially meritorious grievances and thus fulfill their fair representation duty. For, as the Fifth Circuit recently noted, "awards of attorney's fees and costs . . . will often be substantial as in the instant case [and] will provide an appropriate incentive." *Seymour* v. *Olin Corp.*, 109 LRRM at 2737. And, unlike loss-of-wages damages, litigation-related damages are directly related to the nature of the union's wrong, and therefore are more likely to operate to deter breaches of the duty, rather than to operate indiscriminately to deter both responsible and irresponsible decisions not to proceed with a grievance.

2. The other possible source of an indemnity right running from the union to the employer is the collective agreement. But, it is decidedly *not* true that "apportionment of Bowen's lost wages . . . will implement the bargain the parties struck . . . [or protect] legitimate expectations arising out of the collective bargaining agreement." Pet. Br. at 29; see also Gov. Br. at 29.

Typically, as here, the collective agreement does not expressly provide for indemnity in the event of litigation. The agreement provides that the Union has certain rights to raise grievances, it does not obligate the union to do so or to follow any particular internal procedure in exercising its rights, nor, in the face of *Vaca* and

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limited in amount by any action a union can take after the original decision, would be to force the union to take to arbitration every case that does not involve an unsympathetic grievant and is not frivolous on its face.

It is no answer to suggest as the employer does (Gov. Br. at 31, n.19) more careful application of the *Vaca* substantive standard. For, having enunciated a standard to the trier of fact, appellate courts are ordinarily unwilling "to substitute [their] judgment . . . on [an] essentially evidentiary question." *Foust, supra*, 442 U.S. at 46, n.7. Rather, at the very least, clarification of *Vaca's* "arbitrary" and "perfunctory" language by this Court appears in order, to make clear that mere union negligence and errors in judgment are not sufficient justification for holding either employers or unions liable in hybrid § 301/breanch of duty cases.

the one certainty in human affairs—that there may be error—does the agreement grant the employer rights against the union in the event of error. Any such provision, therefore, would have to be implied. Petitioner so recognizes and argues that rather than "compel labor and management to arrive at a . . . contractual apportionment of damages," this Court should authorize courts to imply indemnity agreements as they see fit. Pet. Br. at 31. But, as this Court has just reminded:

> [W]hen neither the collective bargaining process nor its end product violate any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining agreement. [*United Mine Workers Health & Retirement Funds* v. *Robinson*, —— U.S. ——, 50 L.W. 4288, 4291 (March 8, 1982). See also *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 218-219; *Porter Co.* v. *NLRB*, 397 U.S. 99, 105-108.]

Particularly in an area such as indemnity in which the common law of contract disfavors implying agreements not expressly reached by the parties (Prosser, *Law of Torts*, *supra*, p. 310 n.90), this Court should not sanction adding an indemnity clause to the parties' collective agreement.

It is true, of course, that in one limited area this Court has in a sense implied into collective agreements a provision not expressly included by the parties: Whether or not the agreement so provides in so many words, a broad grievance-arbitration provision in a labor contract will be read to include a commitment to refrain from striking over an arbitrable grievance. *Teamsters* v. *Lucas Flour*, 369 U.S. 95. But the implication of a no strike promise from an arbitration clause does not justify the implication of an indemnity promise from such a clause. In essence, the Court in *Lucas Flour* construed the grievance-arbitration provision as including *two* promises—that the dispute over the employer's contractual right to act will be settled by arbitration and that the dispute will

not be settled by resort to economic force—and the second was seen as necessarily included in the first. Viewed in that light, the Court was implementing rather than adding to the promise made by the parties. Here, in contrast, there is nothing inherently illogical in reading the arbitration provision as stating that the contractually-established procedure shall be final to the extent the law allows, and as requiring each party to bear the losses that party has primarily caused in the event of litigation that upsets the results of that procedure.

Indeed, the notion that a final, exclusive grievance-arbitration procedure should be interpreted as necessarily including a promise by the union to absorb backpay losses if the intent to avoid judicial determination of the breach of contract allegations fails is itself inconsistent with the parties' manifest purpose. As a matter of contractual intent, the parties' purpose is to create a procedure for settling grievances that is final and exclusive with respect to *both* the union and the employer. Thus, the union, just as much as the employer, has reason to expect as a purely contractual matter that the exhaustion of the grievance-arbitration procedure will end the dispute. For the union to be held liable, on the petitioner's and the employer's theory, for a portion of backpay damages is therefore no more consistent with the parties' intent in creating a final and exclusive grievance procedure than is holding the employer responsible.

* * * *

The foregoing considerations demonstrate, we believe, that in terms of logic, equity and national labor policy, the rule of apportionment for which the petitioner and the employer in this case argue is decidedly inferior to the one this Court established in *Vaca* and *Czosek* and reaffirmed in the later cases reviewed in Part I, *supra*. Thus, this area is one in which any suspension of *stare decisis* principles is particularly uncalled for. The assumption must be that the parties have chosen to order their respective

rights and liabilities against the background of existing law. Compare *Florida Dept. of Health* v. *Fla. Nursing Home Assn.*, 450 U.S. 147, 153-154 (Stevens, J., concurring). For this reason as well, to alter the allocation rule at this juncture would give the employer more, and the union less, than each has bargained for. The principle established in *Vaca* and *Czosek*—that under the present circumstances backpay damages aer to be borne by the employer who has breached his collective agreement—should therefore be reaffirmed rather than disturbed.

CONCLUSION

For the above stated reasons the judgment below insofar as that judgment holds the Union harmless for backpay damages should be affirmed.

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APPENDIX

Biennial Report

TO THE

NATIONAL CONVENTION OF

THE AMERICAN POSTAL WORKERS UNION

(AFL-CIO)

[Emblem]

Las Vegas, Nevada

August 8-14, 1976

* * * *

CLERK CRAFT DIVISION

APPEALS

The processing of 2-B's (discliplinary appeals) and Step 4's (grievance appeals) for approximately 198,000 Clerk Craft members represents a major function for your Clerk Craft resident officers. In order to enable you to properly evaluate the magnitude of this function, the following information is provided:

Contract Year	Step 4's	2-B's	Total
1971-73	3409	730	4139
1973-75	9320	2446	11766
1975-78	5995	1364	7359

The figures for the 1975-78 contract represent those appeals logged in the Clerk Craft through July 14, 1976, a period of approximately nine months. There are additional appeals being processed by the Director of Industrial Relations office which are not included in these figures. The 1975-78 contract is a three-year contract so it is possible by multiplying the total of 7,359 by 4 to project the possibility of 29,436 appeals being filed before its expiration.

There is no way that the Clerk Craft can maintain a current status on these appeals or even come close under our present system. In view of this, the Clerk Craft officers are exploring various ways and means of adjusting our in-house system in order to expedite the processing of these appeals.

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Petitioner's Reply Brief

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No. 81-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES V. BOWEN, *Petitioner*

v.

UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Respondents

On Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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No. 81-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES V. BOWEN, *Petitioner*

v.

UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Respondents

On Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

(a) The Union Erroneously Asserts that This Court Has Held that a Union Cannot Be Liable for Wages Lost Because of Its Breach of the Duty of Fair Representation.

Respondent American Postal Workers Union ("Union") insists that in *Vaca v. Sipes*, 386 U.S 171 (1967), this Court conclusively established that a union's liability for breach of its duty of fair representation may not be measured by wages lost after the time that proper union representation would have restored a wrongfully discharged employee to his job. The Union

reads *Vaca* and subsequent cases as holding that liability for breach of the duty of fair representation is always and only measured by the litigation costs incurred by the injured employee in vindicating his rights. The Union then argues that the damage apportionment rule sought by petitioner Charles V. Bowen ("Bowen" or "petitioner") and respondent United States Postal Service ("Postal Service") constitutes a drastic departure from settled law.

It is a sufficient answer to this contention that this Court has elected to adjudicate petitioner's case. If further evidence of the error in the Union's analysis is needed, it may be found in Justice Stewart's concurrence in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572-73 (1976), in which he advocated precisely the apportionment principle that Bowen and the Postal Service support. Justice Stewart participated in all of the major cases in this area, and if this Court had already conclusively determined this apportionment question, Justice Stewart would certainly have noted this fact and shaped his opinion accordingly. Finally, as the cases cited in petitioner's opening brief at 23-24, nn. 12-15, clearly indicate, the district courts and courts of appeals have reached widely divergent results based upon the existing precedent. Notwithstanding the Union's suggestion to the contrary, there is manifestly no consensus on the question.

Petitioner believes that the analysis of the leading cases set forth in his opening brief, as well as in the briefs of the Postal Service and the Chamber of Commerce of the United States as *amicus curiae*, sufficiently addresses the effect of this Court's prior decisions on the principal issue here presented. Two additional points should be added on this issue, however.

(1) The Facts in *Vaca v. Sipes* Are Consistent with Petitioner's Damage Apportionment Rule.

First, the Union contends that the facts in *Vaca* compel a reading of that case that apportions to the employer damages accruing after the time that proper union action would have put the employee back to work. (Union Brief at 21.) This contention is inaccurate. As this Court recited the facts in *Vaca*, 386 U.S. at 175-76, 194, the employee's grievance was suspended after the Union suggested that the employee accept the employer's offer of

referral to a rehabilitation center. Following the union's unsuccessful effort to persuade the employee to accept this course, the employee brought suit. The grievance was finally dismissed, however, only shortly before trial began. This Court ruled that the union's handling of the grievance was not a breach of its duty of fair representation.

Under these facts, it is entirely consistent with petitioner's damage apportionment analysis to state, as this Court did, that all or almost all of the employee's damages would in any event be attributable to the employer's allegedly wrongful discharge, 386 U.S. at 198, since the union's failure to proceed with arbitration did not occur until the eve of trial.

(2) This Court's Statements in *Czosek v. O'Mara* Regarding the Damages Properly Assessable Against the Union in that Case Do Not Establish the Union's Freedom from Liability for Back Pay Damages Here.

As this Court recognized in *Vaca*, "the duty of fair representation [stands] as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal law." 386 U.S. at 182. The case at bar presents the classic factual pattern, which was also present in *Vaca:* the employee has lost both his individual right to sue his employer and his individual right to pursue his grievance against the employer through the grievance and arbitration process. The employee is wholly dependent on the union for relief through the machinery of industrial self-government that has been substituted, in accordance with national labor policy, for traditional forms of redress. It is precisely the union's role as exclusive custodian of the arbitration process that gives content to the union's duty of fair representation in this context, that gives the employee a right of action against the union for breach of the duty, and that justifies measuring the employee's damages by the wages lost after the point at which proper union action would have prevented the wage loss.

Czosek, on the other hand, involved employees only partially deprived of the means of self-protection. While national

labor policy required the plaintiffs in *Czosek* to exhaust their administrative remedies before filing suit, the union in *Czosek* did not bear sole responsibility for invoking the administrative process on the employees' behalf. The employees retained their right to secure an administrative determination of the correctness of their discharge. The Second Circuit's opinion in *Czosek* made this explicit:

> The union's refusal to process their grievances does not excuse plaintiffs' failure to exhaust since individual employees have standing to prosecute their own grievances before the [Railway Adjustment] Board.

O'Mara v. Erie Lackawanna Railroad Co., 407 F.2d 674, 677 (2d Cir. 1969). This proposition is clearly the premise for this Court's suggestion that the discharged employees could recover from the union damages for loss of employment measured by the extent to which the union's refusal to handle the grievances added to the difficulty and expense of collecting from the employer. 397 U.S at 29.

The issue is one of causation. Where, as in *Czosek*, a union's default does not cause the employee to fail to procure reinstatement through the grievance and arbitration process, the union of course cannot be held liable for additional wages lost prior to reinstatement. But where, as here, a union controls access to the arbitration procedure, and where the union's failure to invoke that procedure, in breach of its duty owed to the employee, causes an additional period of unemployment, the wages thereby lost properly and precisely measure the injury inflicted by the union.

Thus, two distinct classes of employees are involved in *Czosek* on the one hand and in *Vaca* and this case on the other. The consequences of a union's breach of the duty of fair representation differ accordingly. In the present case the Union alone could demand arbitration of Bowen's grievance. It has been established as a fact that the Union had a duty to take Bowen's case to arbitration, and that if the Union had fulfilled its duty, Bowen would have been reinstated at a time certain. The Union's breach of its duty caused a precisely identifiable wage loss, and an award

of damages in the amount of this wage loss precisely compensates Bowen for his loss at the Union's hands.

(b) The Union Erroneously Likens this Case to One in Which an Employee Retains His Right to Sue His Employer Directly and Immediately for Wrongful Discharge; The Union's Analogy Ignores the Crucial Role of the Duty of Fair Representation—and the Consequences of Its Breach—Where a Union Has Sole Control Over Access to Arbitration on Behalf of an Aggrieved Employee.

The Union's entire argument assumes that the action before this Court is essentially a common law breach of contract action between the employee and the employer. The Union relies heavily on *Smith v. Evening News Association*, 371 U.S 195 (1962), to contend that the proper allocation of damages in the case before the Court is the same allocation that would be appropriate in a common law or *Smith*-type action. (Union Brief at 18-20, 25-28, 33-34, and *passim*.)

In *Smith* this Court held that an employee's suit in state court to enforce a provision of the collective bargaining agreement between his union and his employer was not pre-empted by the jurisdiction of the National Labor Relations Board. *Smith* was thus an important step toward the ultimate holding in *Vaca* that federal courts could hear hybrid § 301—duty of fair representation cases and should do complete justice to an aggrieved employee in a single judicial proceeding. But the collective bargaining agreement in *Smith* provided no grievance arbitration procedure. 371 U.S at 196, n. 1. *Smith* is not a duty of fair representation case, and it raises no damage allocation question. Thus, *Smith* is irrelevant to the essential question in this case—the scope of a union's liability for breach of its duty of fair representation.

The Union repeatedly characterizes this case as though it were playing only a bystander's role in a simple contractual dispute between employee and employer. In essence, the Union conceives of its duty of fair representation negatively, as no more than a "shield" protecting an *employer* from the consequences of

unjust discipline. Once that shield is removed because the Union has breached its duty, the Union believes that all that remains is a standard breach of contract action. (Union Brief at 33-34.)

The Union's argument contains a fatal flaw: it entirely overlooks the Union's positive duty of fair representation, the crucial role that duty plays in the framework of industrial self-government established by our national labor policy, and the consequences demonstrably and foreseeably caused by the Union's breach of duty.

In *Smith*, because there was no contractual grievance process, the union had no responsibility for non-contractual grievances. The employee in *Smith* thus had no expectation that his grievances would be pressed by his union on his behalf. The employer, likewise, had no expectation that the employee's grievances would be quickly and finally resolved through action taken or forborne by the union.

But where, as here, the collective bargaining agreement establishes a mandatory grievance and arbitration procedure in which a union possesses sole power to invoke that procedure on behalf of an aggrieved employee, all of these premises change dramatically. The employee must defer to the contractual grievance and arbitration mechanism and cannot pursue his own breach of contract action as soon as he is fired. Moreover, the employee must rely on the union to represent him. If that representation is fairly performed, the employee has no independent action for the alleged breach of contract. The employer is entitled by his contractual bargain to rely upon proper union action to resolve relatively quickly any uncertainty about the propriety of employee discipline. These interests are protected by enforcing the union's duty of fair representation; which was created by the courts both to protect the individual employee and to insure the prompt and effective functioning of the machinery of industrial self-government. *See Vaca v. Sipes*, 386 U.S. at 190-92; *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63-64 (1981).[1]

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[1]*Mitchell* confirms the impropriety of the Union's simple contract analysis of this case. Emphasizing the unique nature of an unfair representation claim, this Court found such a claim to be "more a creature of 'labor law' as it

The Union thus badly misperceives this case when it argues that Union action did not "impede in any regard the employee from pursuing his breach of contract remedy against the employer," and that the Union should never be liable for back pay damages because it had no power to cut off liability for those damages by reinstating Bowen (Union Brief at 14, 42). If, as the Union contends, the power to affect the date of reinstatement is the critical factor, this factor is precisely reflected in the damage allocation embodied in the district court's judgment. As the district court found and the court of appeals affirmed, the Union in this case had the sole power to take Bowen's case to arbitration and Bowen reasonably relied on proper Union exercise of that power. Had that case gone to arbitration, Bowen's discharge would have been found wrongful and Bowen would have been reinstated at a time certain. Most assuredly, the Union did "impede" Bowen from obtaining reinstatement in his job and from obtaining wages from the time that proper Union action would have resulted in reinstatement. Precisely because the Union had sole control over access to the arbitration procedure, and because the Union breached the duty it owed Bowen to press his claim without discrimination, arbitrariness, or bad faith, the Union owes Bowen damages that will compensate him for the injury caused by the Union's breach of duty.[8]

An employee's hybrid action under *Vaca v. Sipes* against his union for breach of the duty of fair representation and against his employer for unjust discharge is the remedy carefully fashioned by this Court to protect an employee who has suffered a double wrong within the system of industrial self-government. Both the employer and the union in such a situation have caused

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has developed since the enactment of § 301 than it is of general contract law." 451 U.S. at 63.

In addition, *Mitchell* emphasizes that relatively rapid disposition of labor disputes is one of the chief public goods sought by national labor policy. *Id.* The Union's breach of duty—not the Postal Service's initial unjust discharge—has frustrated that goal here.

[8]It is, of course, no answer at all to argue as the Union does at page 24, n. 23 of its brief that Bowen could have waived his right to rely on the Union's duty of fair representation. *See* Joint Appendix at 90-91. Bowen did not waive his rights. He was entitled to rely on the Union and did rely to his detriment.

measurable harm to the employee. In this case petitioner seeks only to hold each wrongdoer liable for the injury each has caused.[8]

[8]The Union attempts to bolster its argument by reference to analogies in the law of trusts and torts. Union Brief at 40-41, n. 31. These arguments, having been made by footnote, will be responded to in like manner.

As the Union acknowledges, the trust analogy is imperfect. The trustee's duty to his beneficiary is in no respect imbued with the significance that inheres in the Union's duty of fair representation under our national labor policy. The trustee is a surrogate only for the beneficiary, and his presence does not fundamentally alter the shape or nature of the transactions in which he is involved. Nevertheless, a trustee who breaches his duty to his beneficiary is liable for a "surcharge" measured by what the trustee's faithlessness costs the beneficiary. *See generally* 2 Scott on Trusts, § 177 (3d ed. 1967). In this case Bowen seeks no more than to hold the Union responsible for a like "surcharge", the damages that the Union's default inflicted on Bowen.

The Union also suggests the aptness of an analogy to situations contemplated by §§ 433A, 441, 452 and 457 of the Restatement (Second) of Torts. These sections deal with a situation in which a first tortfeasor negligently injures the plaintiff and the plaintiff's injury is then aggravated by actions of a second tortfeasor (as where a person negligently injured in an automobile accident is negligently treated by a physician from whom he seeks aid). The Union correctly states that in an action against the first tortfeasor, that tortfeasor may not set up the negligence of the second tortfeasor as a bar to the injured party's recovery for all of his injuries. That is, the doctor's negligence is not a superseding cause which insulates the first tortfeasor from liability.

Had the Union pursued its analysis, however, it would have noted that application of ordinary tort rules tends to substantiate Bowen's claim in this case rather than to refute it. Under Restatement § 433A(1) (b), where two causes contribute to the harm suffered, damages are to be apportioned among the two causes where there is a reasonable basis for determining the contribution of each cause to a single harm. Comment c to § 433A makes clear that while the original tortfeasor, if sued alone, may be held liable for all the damages inflicted, the second tortfeasor, if sued, is liable for the additional harm caused by his own default.

Moreover, § 452(2) states that where one is under a duty to prevent harm to another, breach of that duty constitutes a superseding cause that will subject the one breaching his duty to liability for his own negligence and, under certain circumstances, to liability for the consequences of the initial tortfeasor's negligence as well. *See generally* Comments b, d, e, and f to § 452. Here, the Union had—and breached—a duty imposed by law to represent Bowen fairly. Thus, under the tort analogy suggested by the Union, in an action such as this where both parties who have wronged the employee are properly before the court, each may be required to compensate the injured employee for the damage each has caused him.

(c) The Union's Own Argument Based on *Smith v. Evening News Association* Demonstrates That the Union's Default Caused an Additional Loss of Wages That Bowen Would Not Have Suffered in the Absence of the Union's Breach of Duty.

The Union contends that, despite the existence of compulsory arbitration here and despite the Union's exclusive control over access to the arbitration process, the Union did not cause any increase in the time that Bowen was wrongfully deprived of work. To prove this point the Union relies on *Smith v. Evening News Association, supra,* and argues that the Postal Service should pay the same measure of lost wages that the employer in *Smith* had to pay. But analysis of *Smith* confirms petitioner's position—that the Union, and not the Postal Service, should be held responsible for Bowen's wage loss after the time that arbitration would have put him back to work.

If, as in *Smith*, the collective bargaining agreement here had contained no arbitration provision, Bowen could have sued the Postal Service for breach of contract *immediately* upon suffering unjust discipline. By going directly to court, Bowen could have obtained redress sooner than he was able to do in fact. The Postal Service would properly have been liable for all wages Bowen lost until a fair adjudication of his claim put him back to work. No part of Bowen's lost wages would have been attributable to Union action or inaction.

If Bowen had been able to compel arbitration himself, or if the Union had fulfilled its duty, essentially the same result would have occurred. As the jury found, Bowen would have been reinstated by an arbitrator many months before this case came to trial. Again, the Postal Service would have been liable for all of Bowen's lost wages.

But Bowen could not go directly to court or compel arbitration. Bowen was required by law first to exhaust the contractual grievance process, and he had to rely on the Union to pursue that remedy for him. Only after the grievance process had ended unsuccessfully because of the Union's default could Bowen initiate the court action that the *Smith* employee could commence *immediately*. Obviously, more time passes and more wages are lost

when an employee must, like Bowen, first pursue arbitration and then pursue court action than when an employee, as in *Smith*, can proceed directly to court.

The additional time required to pursue a second means of redress would not have elapsed if Bowen's situation had been like *Smith*, or if the Union had fulfilled its duty of fair representation. This extra period of unemployment is attributable entirely to the existence in this case of compulsory arbitration and the Union's exclusive control over access to that process.

If the Postal Service is to be held liable for damages in like measure as the employer in *Smith*, the analogy yields precisely what the trial court awarded against the Postal Service here: back pay damages from date of discharge until a fair adjudication of Bowen's claim, in the forum where that claim should have been resolved, would have put him back to work. Only the Union's breach of duty caused Bowen's principal avenue to reinstatement to fail of its essential purpose. Only the Union's breach of duty necessitated a second attempt to gain reinstatement and the consequent additional period of unemployment until that second attempt produced results. No analogous period of additional wage loss would have occurred in a *Smith*-type situation. In a real and material sense, the Union's default increased Bowen's total wage loss, and the Union, not the Postal Service, should be responsible for this increase.[4]

(d) The Liability Imposed by the District Court on the Union Directly Reflects the Injury This Union Inflicted on Bowen, and the Unjustified Imposition of Liability in Other Cases is Best Prevented by Careful Application of the Proper Standard of Union Responsibility.

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[4]Nor can the Union avoid its just liability by mischaracterizing the result that Bowen seeks as a requirement that the Union "insure" or "indemnify" the employer for some portion of the employer's just liability for back pay. (*See* Union Brief at 17, 42, 47-48.) Here again, the Union has simply ignored the duty of fair representation it owed to Bowen and its breach of that duty. The Union's breach of duty is the source of its obligation to Bowen, and Bowen here seeks only a measure of damages from the Union that fairly compensates him for the Union's breach.

The Union also argues that the rule for which petitioner and the Postal Service contend would impose liability on the Union that is disproportionate to the injury the Union has inflicted on Bowen. Implicit in this argument is a failure to distinguish between the Union's rightful failure or refusal to process a grievance and its bad faith, arbitrary, or discriminatory failure or refusal to do so. The Union's numerous predictions of dire consequences if petitioner's position is adopted are premised on the unarticulated assumption that virtually any failure to process a grievance will impose liability on the Union. (Union Brief at 43-47.)

This is, of course, not the position that Bowen advocates, nor is it a position that has been sanctioned in any respect by this Court. *Vaca* has firmly established that a union is liable for breach of the duty of fair representation only when it acts in bad faith, arbitrarily, or discriminatorily. If unions are in danger of being found liable in situations where they have not breached the duty of fair representation, the remedy lies in strict enforcement of the appropriate standard of care to which unions are subject. But where, as here, a union has been found to have acted maliciously, recklessly, or in callous disregard of an employee's rights, compensatory damages that precisely measure the injury inflicted are manifestly appropriate.[8]

This Union was found to have breached the duty it owed to Bowen and thereby to have caused Bowen's loss of a specifically identified portion of wages. In response to a compensatory award that was meted out against the Union in precisely the measure of the injury the Union inflicted on Bowen, the Union has claimed that its duty in this situation was insignificant, that Bowen's only real injury was inflicted by the employer, and that the Union played no substantial part in the wrong done to Bowen.

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[8]The Union contends that assessment of attorneys' fees against it more than adequately measures the injury caused to Bowen by the Union's default. (Union Brief at 47.) It is at least a partial answer to this contention that where, as here, the Union wrongfully fails to arbitrate an employee's meritorious case, the Union thereby saves the expenses of arbitration. This savings at least partially offsets a later award of litigation costs against the Union, especially when the time value of money is taken into account.

The Union would thus enjoy the privileges and the respect accorded to responsible, indeed crucial, agents in the industrial arena, but would avoid the duties that necessarily attend such a position. Justice Brandeis believed in 1902 that unions should accept the full burden of responsible citizenship. (See Petitioner's opening brief at 31-32.) Certainly that is the case in 1982.

(e) If the Union is Excused From Paying Any Share of Lost Wages, Bowen Remains Entitled to a Full Compensatory Award From the Postal Service.

Bowen seeks merely an affirmance of the district court's judgment in his favor for a total of $52,954.12 in lost wages and fringe benefits. In response, the Postal Service has argued that somehow Bowen is attempting to attack the decree of the district court in order to enlarge his own rights thereunder or to lessen the rights of his adversary on the apportionment issue. Two short points need to be made in reply.

First, the allocation of damages issue has become part of Bowen's case only because of the Fourth Circuit's belated and erroneous addition of footnote 6 to its original opinion. In the absence of that error, Bowen would have no more than a spectator's interest in the allocation question. His case at trial and on appeal consisted of proof that the Union breached its duty of fair representation, proof that the Postal Service unjustly discharged him, and proof of the remedy to which he was entitled, which included the total amount of back wages he had lost as a result of the wrongs he had suffered. In the trial court Bowen won on all these issues and had no quarrel with the judgment entered by the district court. Indeed, having so prevailed, Bowen had no right to appeal from the district court's judgment. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934).

Both in the trial court and on appeal, the apportionment issue was solely a fight between the Postal Service and the Union. These two parties contested the apportionment issue in the district court and both appealed the damage award. On this issue, the Postal Service and the Union were the true adversaries who sought to affect each others' rights. The Fourth Circuit thus had before it the entire issue of who owed how much—part or all—of the stipulated and uncontested back pay damages suffered by

Bowen. That court also possessed full remedial power to allocate all of Bowen's damages in accordance with the law. 28 U.S.C. § 2106.

In light of its ruling that the Union could never be liable for back pay damages, the court of appeals should have entered judgment against the Postal Service for all of Bowen's lost wages or remanded the case to the district court for reallocation. By so doing, the court of appeals would have done no more than preserve Bowen's rights in his original judgment in accordance with the command in *Vaca* to do complete justice to an injured employee in a single action. Manifestly, the Fourth Circuit's affirmance of the district court's judgment in Bowen's favor in no manner "enlarged" Bowen's rights. If it could be said to "lessen" the rights of the Postal Service, it did so only *vis-a-vis* the Union, who was the Postal Service's true adversary on this issue.[6]

Second, the Postal Service argues that the court of appeal's refusal to reallocate damages against the Postal Service was nevertheless proper because the Postal Service could have settled its liability by paying the portion of damages allocated to it by the district court. The Postal Service thus essentially argues the facts that were presented in *Milstead v. International Brotherhood of Teamsters, Local 957*, 649 F.2d 395 (6th Cir. 1981), *cert. denied*, _____ U.S. _____, 50 U.S.L.W. 3278 (No. 81-258, October 13, 1981). In *Milstead*, the employer settled with the injured employee after trial and one appeal for an amount greater than the trial jury had awarded against the employer, thereby strongly suggesting that the employer recognized the pos-

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[6]It is inaccurate to suggest, as the Union does in its brief at 12, that the principal allocation issue in this case is somehow distorted because of Bowen's failure to appeal from a district court judgment in his favor. It is true that the Fourth Circuit's erroneous addition of footnote 6 to its opinion cast the burden on Bowen of proceeding in this Court to protect his judgment even after he had prevailed on all elements of his case on appeal. But even without the presence of footnote 6, the Postal Service, as the true and proper adversary of the Union on the allocation issue, would have been entitled to press precisely the same arguments on this issue that Bowen has made in this Court. Indeed, it has done so as a respondent here.

sibility that it might on remand be assessed with additional lost wages that the jury had originally awarded against the union. 649 F.2d at 396.

An employer—or union—can always settle all existing and potential claims against it after a trial verdict and before appellate tribunals have had a chance to readjust liability in accordance with the law. Where an injured employee has settled with one party, he has no cause to complain. But here the employer whose fault initiated Bowen's loss has not settled, and so remains amenable to the entry of a proper judgment against it.

CONCLUSION

For the reasons set forth in petitioner's opening brief and in this reply brief, petitioner urges that the judgment of the district court be reinstated in full and that the Union be required to pay petitioner compensatory damages composed of those wages lost because of the Union's breach of its duty of fair representation.

In the alternative, if this Court permits the Fourth Circuit's ruling with respect to the Union to stand, the Postal Service must be required to reimburse Bowen for all wages he lost after his unjust discharge. In the interests of fairness and justice, and to protect the power of the courts to render full relief in cases of this nature, this Court should exercise its supervisory powers and either enter judgment for Bowen or remand the case for entry of judgment in the full amount of the compensatory damages to which all parties and all courts have agreed he is entitled.

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Respondent's Reply Brief

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No. 81-525

In the Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES V. BOWEN, PETITIONER

v.

UNITED STATES POSTAL SERVICE and
AMERICAN POSTAL WORKERS UNION, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-525

CHARLES V. BOWEN, PETITIONER

v.

UNITED STATES POSTAL SERVICE and
AMERICAN POSTAL WORKERS UNION, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

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1. APWU's "basic submission" (Br. 19; see also *id.* at i, 14-16, 18-36) is that the Court has previously decided the question presented by this case. According to the Union (Br. 18), this Court "has already established and several times reaffirmed" that no portion of back pay damages may be assessed against a union in a breach of collective bargaining agreement/breach of duty of fair representation suit like this one.

As we explained in our opening brief (at 14-22), the Union's assertion is belied by this Court's prior statements and by the remarks of individual Justices, which strongly suggest that a union will be liable to a wrongfully discharged employee for back wages that accrue subsequent to the time when the employee would have been reinstated but for the union's breach of its duty of fair representation (the "hypothetical reinstatement date"). Nonetheless, we have admitted (Gov't Br. 9, 13-14) that

the Court has never directly addressed the apportionment of damages issue presented by this case. Accordingly, while the Court's previous pronouncements may provide useful points of departure, the question presented here must be answered by resort to the federal common law considerations of national labor policy and basic equity. See Gov't Br. 23-34.

a. APWU places primary reliance (Br. 19-21, 29-34) on *Vaca* v. *Sipes*, 386 U.S. 171 (1967). In that case, the Court held that a union would not be found to have breached its duty of fair representation, absent evidence that it acted arbitrarily, discriminatorily or in bad faith in settling a grievance short of arbitration. *Id.* at 193-195.[1] Because that standard was not satisfied in *Vaca*, the Court had no occasion to determine whether or in what manner damages should be apportioned between the union and the employer.

APWU relies, however, on a second reason given by the Court for reversing the award against the union in *Vaca* —the fact that the union had been assessed damages attributable to the employer's breach of contract (386 U.S. at 195-198). But neither the Court's damages discussion in *Vaca* nor the underlying facts of that case warrants the conclusion that the Court intended that back wages never be assessed against a union in a breach of collective bargaining agreement/breach of fair representation suit.

The employee in *Vaca* was discharged on January 8, 1960, and the union's decision not to take his grievance to arbitration was made sometime after February 6, 1961. 386 U.S. at 175. Arbitration resulting in the employee's

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[1] In both *Vaca* and the present case, the alleged breach by the union arose from its failure to take the final step provided for in the grievance procedure—binding arbitration (*Vaca* v. *Sipes*, *supra*, 386 U.S. at 175 & n.3, 193-194). Unlike in *Vaca*, however, the factfinder in this case determined that the Union's inaction was the result of "malicious[ness,] * * * reckless[ness], or * * * callous disregard of the rights of plaintiff Charles V. Bowen" (Pet. App. A22; see also *id.* at A15).

reinstatement thus would have occurred—at the earliest—in February 1961. In his complaint, filed February 13, 1962, the employee sought, as compensatory damages, $6500 per year "continuing until the date of trial, or, until employer permits Plaintiff again to work under said contract," for a total of $7,000 in actual damages (*Vaca* v. *Sipes*, No. 114, October Term, 1966, R. 1, 4; see also 386 U.S. at 173, 195). It is reasonable to assume that the employee suffered at least some of his lost wages in the immediate aftermath of his discharge. The union in *Vaca*, however, was assessed *all* of the damages sought. *Id.* at 195. The union's liability thus included the portion of back wages that accrued prior to the time successful arbitration would have resulted in the employee's reinstatement as well as any portion that may have accrued thereafter. It is common ground that the first portion of damages should not have been assessed against the union. Accordingly, the more likely explanation of the Court's alternative holding in *Vaca* is that this first portion of damages—"damages attributable *solely* to the employer's breach of contract" (386 U.S. at 197; emphasis added)—had erroneously been assessed to the union. As the Court stated, "*such* damages are not recoverable from the Union *in the circumstances of this case*" (*id.* at 195; emphasis added).[2]

APWU (Br. 32) also points to the Court's conclusion in *Vaca* that an employer will be subject to a breach of contract suit notwithstanding the fact that it "may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement" (*Vaca* v. *Sipes*, *supra*, 386 U.S.

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[2] Vacation of the back pay damages award against the union in *Vaca* also was required by the fact that the employee's suit against his employer had not yet been resolved. 386 U.S. at 176 n.4. In the absence of a determination that his discharge was unlawful, the employee was not entitled to any back pay damages. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 73-77 nn.2 & 4 (1981) (Stevens, J., concurring in part and dissenting in part).

at 185). But it hardly follows that an employer in such a situation also should be subject to liability for back wages accruing *after* the hypothetical reinstatement date. As the Court recognized in *Vaca* (*id.* at 185-186), there is no reason to shield the employer from suit altogether because, had the union not breached its duty, the employer presumably would have been held liable in the grievance arbitration procedure for damages up to that date. The same analysis does not apply, however, with respect to liability for back pay damages for the period following the hypothetical reinstatement date, since those damages never would have accrued were it not for the union's breach. Moreover, as the Court noted (*ibid.*), refusal to permit the employee's suit to proceed against the employer with respect to the period preceding the union's breach would leave the employee "remediless," since the union's breach would not render it liable for back pay damages that accrued prior thereto. By contrast, that consideration does not require the employer to bear the back pay damages that accrued subsequent to the union's breach of its fair representation duty, since those damages can be fairly and directly traced to the union's wrong (see Gov't Br. 25-26).

b. As we noted in our opening brief (at 18 & n.12), in *Czosek* v. *O'Mara*, 397 U.S. 25 (1970), the Court suggested by necessary implication (*id.* at 29) that unions would be liable for some damages for "loss of employment." Like *Vaca*, however, *Czosek* did not require the Court to resolve definitively the questions whether or how damages for back pay should be apportioned between a guilty employer and a guilty union. Rather, following an appeal from the dismissal of a complaint, the Court simply held that a union could be sued alone for breach of the duty of fair representation, notwithstanding that "the damage to employees had its roots in their discharge by the [company] prior to the union's alleged refusal to process grievances" (*id.* at 28). The Court's rationale was that the damages would in some manner be appor-

tioned between the union and the employer *according* to *the fault of each* (*id.* at 29), regardless of whether they were sued separately or in the same action.[3] Nor did any of the subsequent decisions of this Court on which the Union relies (APWU Br. 34-35) squarely address the apportionment issue that is raised here.

c. APWU also argues that the result reached below is inconsistent with "the intricate structure the Court has evolved regarding suits by individual employees against employers under § 301" of the Labor Management Relations Act (Br. 36). To the contrary, it is the Union's position that relies (*id.* at 25-28) on dissenting views that have never been adopted by a majority of the Court and ignores the distinctive nature of the grievance process.

The Union would have the Court equate an employee's suit against an employer on a collective bargaining agreement containing a grievance arbitration mechanism, once the union is shown to have breached its duty of fair representation by failing to prosecute the employee's grievance, with a simple contract action on an individual em-

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[3] In our opening brief (at 17 n.11), we suggested that an employee's right to process his own grievance under Section 3 of the Railway Labor Act (the statute involved in *Czosek*), 45 U.S.C. 153 First (i), (j), may affect the amount and kind of damages recoverable from his union in a breach of the duty of fair representation suit predicated on the union's failure to process the grievance. APWU responds (Br. 24 n.23) by noting that petitioner also could have appealed his discharge to the Civil Service Commission on his own. The Union fails to point out, however, that ~~the employee's~~ petitioner's right independently to appeal his discharge expired 15 days after his receipt of the Postal Service's letter of decision, dated March 30, 1976, and that his election to appeal his discharge himself would have "waive[d] access to any procedures under the National Agreement beyond Step 2B of the Grievance-Arbitration Procedures." J.A. 90-91. Here, petitioner elected to rely on his full rights to union prosecution of his grievance. Accordingly, when the Union subsequently breached its duty fairly to represent petitioner, there was no longer any independent administrative recourse available to him.

ployment contract or on a collective bargaining agreement that does not contain a grievance arbitration procedure. Thus, according to the Union, a collective bargaining agreement that contains an exclusive grievance and arbitration procedure is nothing more than an ordinary employment contract to which an "exhaustion" requirement has been appended; once the "exhaustion" requirement has been met or excused the suit reverts to one on an ordinary employment contract, in which the employer is liable to the employee for all of his lost back wages.

The Union's theory finds support only in the dissenting opinions of Justice Black in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and *Vaca*.[4] In *Republic Steel*, Justice Black argued that an employee's Section 301 suit against his employer for severance pay allegedly owed under a collective bargaining agreement should not be barred by the employee's failure to invoke the grievance arbitration provisions of the agreement, since such an action was merely "an ordinary common, run-of-the-mill lawsuit for breach of contract" (379 U.S. at 659; see also *id.* at 664). The Court, of course, rejected Justice Black's view. Justice Black was also in dissent in *Vaca*, again characterizing the employee's Section 301 suit for wrongful discharge as "a simple breach-of-contract action" (386 U.S. at 210; see also *id.* at 203).

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[4] APWU also relies heavily (Br. 18-19, 25-27) on this Court's decision in *Smith* v. *Evening News Association*, 371 U.S. 195 (1962), as authority for the right of a plaintiff-employee in a Section 301 action to recover all of his back wages from the employer. In *Smith*, however, "[t]here was no grievance arbitration procedure in [the] contract which had to be exhausted before recourse could be had to the courts" (371 U.S. at 196 n.1). Accordingly, as the Union recognizes (Br. at 27), "the entire fair representation concept [was] irrelevant" in that case. Hence, the damages rule applied in *Smith* or, a fortiori, in actions for breach of individual employment contracts is wholly immaterial to cases like the present one, which directly implicate both the duty of fair representation and the grievance arbitration procedure.

Notwithstanding the Union's bare assertion (Br. 32-33), there is nothing in the Court's opinion in *Vaca* to suggest that, while rejecting Justice Black's view that an employee need only show that he *attempted* to exhaust the grievance procedure in order to bring an action against his employer on the collective bargaining agreement, the Court nevertheless adopted the theory on which the dissent was based—*i.e.*, aside from an "exhaustion" requirement, an action on a collective bargaining agreement is no different from an action on any employment contract. To the contrary, had the Court adopted Justice Black's view that an action for breach of a collective bargaining agreement is a simple contract claim, it is unlikely that the Court would have held, as it did in *Vaca*, that an employee who was injured by an employer's breach of contract and who did everything in his power to invoke the contractual procedures nonetheless could be denied relief against everyone. See Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 704-705 (1973).

Indeed, this Court has expressly rejected the notion that a collective bargaining agreement containing a grievance arbitration provision is equivalent to an ordinary, individual employment contract (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581 (1960)):

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. * * *
>
> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through

> the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
>
> * * * The grievance procedure is, in other words, a part of the continuous collective bargaining process.

See also *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 63-64 (1981).

It is precisely this distinctive nature of the grievance process as the vehicle for the determination of the substantative rights of the parties to the collective bargaining agreement that gives rise to the employer's right to rely on the proper functioning of the grievance machinery. Because the grievance process itself defines the rights of the parties, once the employer is vindicated in the arbitration procedure or once the time for processing a grievance or demanding arbitration passes, the employer has, in effect, acted in accordance with the collective bargaining agreement in discharging or disciplining the employee. The employer thus has no incentive or, indeed, reason to take any "corrective" action. Nor is his failure to do so wrongful. As Justice Stewart stated in his concurring opinion in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 573 (1976), once the grievance process is exhaused or expires, the employer's "failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination." Accordingly, there is no basis for assessing to the employer any back wages attributable to that time period. "To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective bargaining agreement." *Ibid.*[5]

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[5] APWU engages in an extended discussion (Br. 19-36) in an attempt to show that Justice Stewart's suggested division of damages is flatly inconsistent with the premises of *Vaca*. But Justice Stewart joined in the Court's opinion in *Vaca* and did not argue in *Hines* that *Vaca* should be overruled or reconsidered.

2. APWU's position that a union may be assessed only attorney's fees and court costs in a case like this one overlooks the settled principle that "[u]nder the American Rule * * * attorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'" *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters*, No. 81-497 (June 1, 1982), slip op. 4, quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967). To be sure, attorney's fees may be recoverable against a union that has breached its fair representation duty under the "bad faith" exception to the American Rule (see, *e.g.*, *Vaughan* v. *Atkinson*, 369 U.S. 527, 530-531 (1962); pages 14-15 and note 11, *infra*). Nonetheless, in view of the general rule against recovery of attorney's fees, we doubt that this Court had attorney's fees foremost in mind when it spoke in *Vaca* of "damages * * * attributable to the union's breach of duty" (386 U.S. at 196) or in *Czosek* of "those damages that flowed from" the union's conduct (397 U.S. at 29). "Indeed, the American Rule presumes that the word 'damages' means damages exclusive of fees." *Summit Valley Industries* v. *Local 112, etc., supra*, slip op. 5-6, citing *Arcambel* v. *Wiseman*, 3 U.S. (3 Dall.) 306 (1796); *Day* v. *Woodworth*, 54 U.S. (13 How.) 362 (1851). It is thus most unlikely that the Court's references in *Vaca* and *Czosek* to apportionment of "damages" between the union and employer could have been intended to limit the union's liability to attorney's fees, which are *not* generally encompassed by the term "damages," and to prohibit union liability for lost wages, which *are* generally described under that rubric.

3. We showed in our opening brief (at 23-34) that considerations of national labor policy and equity argue in favor of a rule that assesses damages against a union for the portion of an employee's back wages that would not have been lost but for the union's breach of its duty of fair representation. APWU has failed to make a persuasive case for a contrary result.

a. The Union first notes (Br. 38-40) that the employer is the sole "cause" of an employee's discharge from employment and alone wields the power to reinstate a discharged employee. It does not follow from these propositions, however, that the union does not at some subsequent point become the "cause" of the employee's further loss of wages because of its failure to perform its duty of fair representation and obtain the employee's reinstatement. Indeed, it is somewhat peculiar for APWU to concede (Br. 38 & n.29) that a union would be liable for a portion of back wages if it took action that caused a worker to be fired—even though the employer alone has the power to discharge—yet to contend that a union is wholly immune from such damages when it takes or refuses to take action that causes the worker not to be rehired.

As the facts of this case demonstrate, in the typical Section 301 discharge/breach of fair representation duty suit, the employee's period of unemployment is made up of two components—the time between discharge and the date the employee would have been reinstated had the union acted properly, and the time between the hypothetical reinstatement date and trial. While it is true that the employee would suffer no unemployment at all if the employer had not discharged him in the first place, it is equally true that, *but for the union's wrongful conduct*, there would be no prolongation of the period of unemployment and concomitant further accrual of back wages.[6]

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[6] The Union's assertion (Br. 39, quoting *De Arroyo* v. *Sindicato De Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir.), cert. denied, 400 U.S. 877 (1970)) that " 'there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated at an earlier date' " wishes away the district court's specific finding (Pet. App. A15) that "[i]f plaintiff's grievance had been arbitrated as provided for in the collective bargaining agreement of the parties a result could have been anticipated by approximately August, 1977, reinstating plaintiff in his employment."

Accordingly, while "damages attributable *solely* to the employer's breach of contract should not be charged to the union" (*Vaca v. Sipes*, *supra*, 386 U.S. at 197; emphasis added), "increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Id.* at 197-198. Because "those damages"—for back pay—accruing subsequent to the time successful arbitration would have resulted in the employee's reinstatement constitute such "increases," they are chargeable against the union.

It is no answer to say (APWU Br. 39-42) that the employer could have reinstated the employee at any time. As we showed in our opening brief (at 26-29) and above (page 8, *supra*), when an employer is a party to a collective bargaining agreement containing a grievance arbitration procedure, it has no reason to reinstate a discharged employee unless and until the other party to the agreement—the union—protests that the discharge was wrongful, *i.e.*, in violation of the agreement.[7]

b. APWU also contends (Br. 41-43) that it would be "seriously inequitable" to hold a union liable for a portion of an employee's back wages in a case of this kind. But there is nothing unfair about holding a union responsible for the consequences of its own breach of duty, particularly because such a breach must be predicated on a finding of bad faith, arbitrariness or discrimination on the part of the union.

We note at the outset that the Union's "equity" argument is premised not on the facts of the present case, but rather on a hypothetical situation in which a union, after the expiration of the contractual deadlines for invoking

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[7] We decline the Union's invitation to explore analogies to the law of trusts and torts (APWU Br. 40-41 n.31). Rather, we adhere to this Court's admonition that common law concepts are not to be imported and applied to resolve questions of national labor policy, which must instead be determined with reference to the purposes and policies underlying the federal labor laws. See *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 120-129 (1944).

the applicable grievance and arbitration procedures, seeks to rectify its breach of duty by belatedly pressing the employee's grievance. If the employer then refuses to waive the applicable time limitations,[8] with the result that the employee's back wages continue to accrue until the time of trial, the Union argues that it would be unfair to assess those damages to the union because they are "without relation to the particular wrong perpetrated by [it]" (APWU Br. 43).

The short answer to the Union's hypothetical situation is that the additional damages are indeed directly related to the union's wrong in not timely—and therefore not effectively—invoking the grievance arbitration mechanism that would have tolled the accrual of back wage damages. Moreover, in considering the equities of who—as between the union and the employer—should be liable for lost wages accruing after the hypothetical reinstatement date, it should be borne in mind that in order for a union to be assessed *any* damages in such a case it must have acted arbitrarily, discriminatorily or in bad faith, while the employer's liability may be predicated on nothing more than a good faith error of judgment. See *Vaca* v. *Sipes*, *supra*, 386 U.S. at 193-195.[9]

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[8] We note that in this case, by the time the Union made its ultimate decision not to take petitioner's grievance to arbitration, the contractual time limit for requesting arbitration had passed and the Union was working under an extension of time granted by the Postal Service. Pet. Br. 6.

[9] Thus, we too can pose hypotheticals. An employer might, by honest mistake—perhaps clerical error—discharge an employee without "just cause." The employee could then turn to the union to process his grievance, but the union—perhaps for reasons of personal animosity or racial discrimination—might wantonly, callously and maliciously refuse to process his meritorious grievance, thereby causing the employee to remain unemployed for an unnecessarily prolonged period until he establishes his claim against the union and employer in court. Under the Union's theory of apportioning damages, the employer nevertheless would be liable for all of the employee's lost wages.

In any event, the result we urge here does not compel the further conclusion that a union would be held liable for back wages damages that accrued subsequent to the time an employer declined a belated request to arbitrate or otherwise process a grievance. As this Court recognized in *Vaca* v. *Sipes*, *supra*, 386 U.S. at 195, "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach."

We explained in our opening brief (at pages 28-30) and above (page 8, *supra*) that the result we urge here is required by the well-settled right of the employer to rely on the proper functioning of the grievance machinery. Even belated resort to that machinery would inform an employer whether his action had been in accordance with the collective bargaining agreement and, if it were not, would afford him an opportunity to reinstate the employee or take other corrective action. Thus, the employer's right to rely on the grievance machinery does not necessarily preclude a rule that shifts back to the employer damages for lost wages attributable to any period following the employer's refusal to entertain a grievance belatedly presented by the union. Accordingly, whatever the merits of the Union's "equity" argument, it has no bearing on the disposition of the present case.

c. Finally, the Union argues (Br. 43-49) that there are no considerations of federal labor policy that justify the apportionment of back pay damages to a union in a Section 301/breach of the duty of fair representation case. APWU begins this discussion with the puzzling statement (Br. 44; emphasis in original) that the union's duty of fair representation is "an unlikely source from which to derive a responsibility running from the union *to the employer* to absorb a portion of the backpay damages * * *." But APWU was sued by petitioner, not by respondent United States Postal Service. It is the employee, not the employer, who is seeking back pay damages from the Union *for the Union's breach of its duty to*

represent him fairly. The question presented by this case is what remedies are available against a union for its breach of the duty of fair representation.[10]

APWU next contends that the imposition of wage-loss damages to deter future union misconduct is unwarranted because (1) the amount of the back pay award "bears no relationship to the magnitude of the union's wrong" (Br. 44), (2) the award of back pay damages against the union would unduly discourage settlement of grievances (*id.* at 45), and (3) the union is already subject to the deterrent of attorney's fees and other litigation costs (*id.* at 46-47).

We have already responded to the first two points. See Gov't Br. 30-33; pages 11-13, *supra*. We reply here to APWU's contention (Br. 46-47) that unions already are sufficiently deterred from breaching the duty of fair representation by their potential liability for attorney's fees and costs. See *Seymour* v. *Olin Corp.*, 666 F.2d 202, 215 (5th Cir. 1982). As noted above (page 9, *supra*), the awarding of attorney's fees in litigation runs counter to the traditional American Rule, which was recently reaffirmed by this Court in the federal labor law context. See *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters, supra* (attorney's fees incurred by employer during NLRB proceedings on unfair labor practice charge against union are not recoverable

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[10] Similarly, APWU concludes this portion of its brief with a discussion of its view that the collective bargaining agreement does not create "an indemnity right running from the union to the employer" (Br. 47). Again, we note that the Postal Service has not sued APWU for indemnification, nor has it impleaded APWU in a suit originally brought only against the Postal Service. If by these statements the Union is suggesting that it is improperly being required to pay wages, whereas the employer is the party responsible for the payment of wages, we note the obvious—that the employee is not being paid "wages" as compensation for services rendered, but rather he is being afforded relief for the Union's breach of its duty fairly to represent him, in damages measured by the employment contract.

in employer's subsequent suit for damages against union under Section 303(b) of the Labor Management Relations Act, 29 U.S.C. 187(b)). Hence, while the Court has not yet ruled whether an employee may recover attorney's fees from his union in a fair representation suit, *Summit Valley* at least raises a substantial question whether such fees are routinely recoverable.[11]

In any event, even if unions routinely may be held liable for attorney's fees in fair representation suits, and even if the specter of that liability is sufficient to deter future misconduct, unions should not for those reasons escape liability for their apportioned share of the employee's lost wages. In the first place, if these damages were not assessed to the admittedly blameworthy union, they would fall on either of two innocent parties—the employer, who is justified in not reinstating the employee once the time for arbitration has expired, or the employee. Furthermore, an apportionment rule would strengthen the employer's confidence in the fair working of the grievance procedure and encourage the use of private grievance machinery, thus effectuating "the overarching legislative goal * * * to facilitate collective bargaining and to achieve industrial peace." *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 47 (1979).

4. Finally, it should not pass without comment that APWU has taken far too much liberty in presenting and rearguing the "facts" of this case. We sympathize with

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[11] One argument in favor of permitting employees in fair representation suits to recover attorney's fees is that in order for a union to have breached its duty of fair representation, as defined in *Vaca* v. *Sipes*, *supra*, the union must have brought itself within the "bad faith" exception to the American Rule (see *Vaughan* v. *Atkinson*, *supra*). As this Court has held (*Vaca* v. *Sipes*, *supra*, 386 U.S. at 190-191), however, a union may breach its duty of fair representation not only by conduct that is in "bad faith" but also by "arbitrary" or "discriminatory" conduct. It is thus possible that a union could breach its duty of fair representation without acting in bad faith and, therefore, without exposing itself to liability for attorney's fees on that ground.

the Union because we too vigorously litigated and contested the factual findings below. Nevertheless, neither we nor APWU cross-petitioned to this Court on the ground that the jury's findings of fact were unsupported by the evidence, and neither respondent preserved its argument that the trial court's factual findings were clearly erroneous. Accordingly, notwithstanding the Union's attempt to "preserve [its] position" (Br. 13 n.14), both respondents in this Court are bound by the facts as found at trial and sustained on appeal.

Thus, despite APWU's rendition of the "facts" (Br. 3-10) and its repeated protestations against the validity of the jury's findings (*id.* at 12-13 n.14, 45 n.33, 46-47 n.34), it remains that the jury specifically found (Pet. App. A22) that the union "acted maliciously or recklessly, or in callous disregard of the rights of [petitioner] in not taking [petitioner's] grievance to arbitration[]." And, based on the jury's special verdict, the district court found (Pet. App. A15) that "APWU handled [petitioner's] apparently meritorious grievance arising from his discharge in an arbitrary and perfunctory manner and in so doing acted in reckless and callous disregard of [petitioner's] rights." It is on this factual record that the Union's legal claims must be considered.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed insofar as it eliminates the Union's liability for $30,000 of petitioner's lost wages.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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Amicus Brief

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v.
UNITED STATES POSTAL SERVICE
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AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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In THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-525

CHARLES V. BOWEN,

Petitioner,

v.

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

I. INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States "Chamber") is the largest federation of business and professional

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule No. 36.2.

organizations in the United States. Its current membership exceeds 209,000 members, including over 205,000 corporations, partnerships, and sole proprietorships, as well as over 4,000 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents its members' interests in litigation and other matters before the courts, the United States Congress, the Executive Branch and federal regulatory agencies. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as an *amicus curiae* in a wide spectrum of cases before this Court.[2]

The question before the Court in the instant case is whether a union, whose adjudicated breach of its duty of fair representation caused a loss of wages beyond the loss that would have occurred if the union had fulfilled its duty, may be required to pay as compensatory damages the amount of the wage loss caused by the union's fault. The District Court answered that question by holding:

> Plaintiff [employee] is entitled to recover compensatory damages for his lost earnings from the two defendants [the employer and the union] apportioned between them according to the damage caused by the fault of each. *Vaca v. Sipes, supra* [386 U.S. 171, 17 L.Ed. 2d 842]. Although there is authority suggesting that only the employer is liable for damages in the form of back pay, the Court finds that this is a case in which both defendants, by their illegal acts, are liable to plaintiff. *Hines v. Anchor Motor Freight, Inc., supra* [424 U.S. 554, 47 L.Ed. 2d 231]; but see, *Czosek v. O'Mara*, 397 U.S. 25, 25 L.Ed. 2d 21. . . . The problem in this case is not one of liability but

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[2] *See, e.g., Buczynski v. General Motors*, —— U.S. ——, 68 L.Ed. 2d 402 (1981); *Whirlpool Corp. v. Ray Marshall*, 445 U.S. 1, 63 L.Ed. 2d 154 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 60 L.Ed. 2d 208 (1979); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed. 2d 707 (1978).

> rather one of apportionment, which was properly left to the jury as to the defendant APWU and which, on the basis of the advisory jury, the Court finds was also equitably apportioned as to the defendant USPS. While the USPS set this case in motion with its discharge, the APWU's acts, upon which plaintiff reasonably relied, delayed the reinstatement of plaintiff and it is a proper apportionment to assign fault to the APWU for approximately two-thirds of the period the plaintiff was unemployed up to the time of trial. [Petition, pp. A17-A18].

The Court of Appeals for the Fourth Circuit provided a different answer, explaining only:

> As [employee] Bowen's compensation was at all times payable only by the [employer] Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations . . . was chargeable to the Union. *Cf. Vaca v. Sipes*, 386 U.S. 171, 195 (1967). . . . [Petition, p. A5].

The Chamber believes that the answer of the District Court, not that of the Court of Appeals, is correct, and, hence, supports Petitioner on the question herein. The issue is one of direct and substantial interest to the Chamber and its members.

First, in the Chamber's view, it is inequitable to require employers to bear the entire backpay liability in cases such as this in which the evidence persuasively indicates that the employee, though wrongfully discharged by the employer, would have been reinstated much sooner were it not for the union's breach of its duty of fair representation. Collective bargaining agreements typically provide that employees shall be discharged only for just cause, and contain grievance/arbitration procedures to resolve disputes as to what constitutes just cause in any particular instance. An employer who enters into such an agreement thereby accepts as a reality of industrial

life the possibility that he may improperly discharge an employee and thereafter be directed by an arbitrator to offer that employee reinstatement with backpay. What the employer does not undertake to accept, and ought not to be forced to accept, is the additional backpay to which the employee is entitled because his reinstatement was delayed as a result of the union's breach of its duty in handling the employee's grievance.

Second, it is also the Chamber's view that, even aside from the inequitable consequences for employers, the position of the Court of Appeals immunizing unions from backpay liability will have an adverse impact on labor-management relationships. Certainly employers do not want unions to be so concerned about incurring backpay liability that they will press grievances which they know to be lacking in merit. But neither do employers want to be confronted with numerous § 301 actions filed by employees who believe their grievances have not been fairly handled by their union representatives. The Chamber urges that the District Court's decision strikes a proper balance between these competing considerations, whereas that of the Court of Appeals goes too far in relieving unions of the consequences of their misconduct to provide an effective deterrent.

It is for these reasons that the Chamber respectfully submits its views.[3]

II. SUMMARY OF ARGUMENT

1. In *Vaca v. Sipes*, 386 U.S. 171, 17 L.Ed. 2d 842 (1967), this Court stated that in § 301 actions in which a union is also charged with breaching its duty of fair

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[3] The Chamber takes no position on the second issue on which certiorari has been granted: *i.e.*, whether Petitioner should have appealed the apportionment of damages ordered by the District Court even though the total amount was satisfactory to him.

representation, the "governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each." Further analysis of the *Vaca* opinion refutes the position taken by the Fourth Circuit in this case that backpay is the obligation of the employer exclusively; instead, such analysis supports the judgment of the District Court apportioning backpay liability to the union to the extent that total backpay liability was increased because the aggrieved employee would have been offered reinstatement earlier had the union not breached its duty of fair representation. Our analysis of the *Vaca* opinion is buttressed by Justice Stewart's concurring opinion in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 47 L.Ed. 231 (1976), and language in this Court's recent decision in *Clayton v. Automobile Workers*, —— U.S. ——, 68 L.Ed. 2d 538 (1981). *Czosek v. O'Mara*, 397 U.S. 25, 25 L.Ed. 2d 21 (1970) is not to the contrary.

2. Decisions of the National Labor Relations Board as well as federal appellate and district courts generally recognize an obligation to impose backpay liability on a union for breach of its duty of fair representation when imposition of such liability is necessary to provide an adequate make-whole remedy. The logic of those decisions warrants apportionment of backpay liability to a union to the extent its failure to fairly process an employee's grievance results in increased loss of earnings beyond those the employee would have suffered had the grievance been processed properly, even though the employer is also liable for backpay. Law review comment endorses this rule of apportionment. Shifting the entire backpay liability to the employer places an inequitable burden on him in a way that is inconsistent with his collective bargaining commitment, and the nature of his collective bargaining responsibilities.

III. ARGUMENT

SOUND JUDICIAL PRECEDENT, A REASONED NATIONAL LABOR POLICY, AND GENERAL CONSIDERATIONS OF EQUITY ALL REQUIRE THAT A UNION WHICH HAS BREACHED ITS DUTY OF FAIR REPRESENTATION SHOULD NOT BE IMMUNIZED FROM BACK PAY LIABILITY, BUT RATHER SHOULD BEAR ITS SHARE OF SUCH LIABILITY IN ACCORDANCE WITH THE APPORTIONMENT PRINCIPLES APPLIED BY THE DISTRICT COURT IN THIS CASE

A. The Apportionment Principles Applied By The District Court Are Mandated By The Decisions Of This Court, And The Court Of Appeals Erred In Reversing The District Court By Relieving The Union Of Any Back Pay Liability

Well before *Vaca v. Sipes*, 386 U.S. 171, 17 L.Ed. 2d 842 (1967), it had been settled that a union which is the exclusive collective bargaining representative for a unit of employees has the statutory duty to fairly represent all of the unit's employees, not only in collective bargaining but also in processing grievances arising under the labor agreement or otherwise enforcing the agreement's provisions.[4] In *Vaca v. Sipes*, an employee

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[4] "The statutory duty of fair representation was developed over twenty years ago [beginning in 1944] in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N.R. Co., 323 US 192, 89 L. ed 173, 65 S Ct 226 [1944]; Tunstall v. Brotherhood of Locomotive Firemen, 323 US 210, 89 L ed 187, 65 S Ct 235 [1944], and was soon extended to unions certified under the NLRA, see Ford Motor Co. v. Huffman, supra. [345 US 330, 97 L ed 1048, 73 S Ct 681 (1953.] Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 US [335], at 342, 11 L ed 2d [370] at 377 [1964]." *Vaca v. Sipes, supra*, 386 U.S. at 177, 17 L.Ed 2d at 850.

sued his union, contending that the latter had breached its duty of fair representation in handling a grievance filed on his behalf over his discharge, which the employee asserted violated the collective bargaining agreement with his employer. This Court held that an action of this type against a union is not pre-empted by the National Labor Relations Act (NLRA), 29 U.S.C. § 141 *et seq.*, and, provided the employee can prove a breach of duty by the union, he may join the employer as a party defendant for the alleged breach of contract.[5] It was recognized, of course, that if a breach of duty by the union and a breach of contract by the employer are proven, an appropriate remedy must be fashioned. 386 U.S. at 187, 17 L.Ed. 2d at 856. Accordingly, the Court's opinion discussed the nature of such a remedy. That discussion, we submit, cannot be reconciled with the position taken by the Court of Appeals in this case to the effect that, in breach of duty/breach of contract actions, reimbursement of lost earnings is the obligation of the employer "exclusively" and "no portion of the [employee's] deprivations" can be chargeable to the union. Rather, it supports the District Court's determination that the employer is liable for lost earnings up until the date the employee would have been reinstated had the union represented him fairly and taken his grievance to arbitration, and the union is liable for the increased loss of earnings from that date until the date of the court trial vindicating the employee's rights in his § 301 suit.

Thus, this Court in *Vaca* assumed that there would be "at least some cases" in which "the union's breach of duty will have enhanced or contributed to the employee's injury." 386 U.S. at 187, 17 L.Ed. 2d at 856. In footnote 12 (386 U.S. at 188, 17 L.Ed. 2d at 856), for example, it specifically raised the possibility that in

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[5] Section 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, authorizes suits for violation of contracts between an employer and a labor organization. Individual employees may sue under § 301 to vindicate their contract rights. *Smith v. Evening News*, 371 U.S. 195, 200-201, 9 L.Ed. 2d 246, 251 (1962).

situations like the instant case—that is, in which the employer breached the collective bargaining agreement in discharging the employee, and the union breached its duty in handling the employee's grievance—a trial court might properly conclude that a part of the employee's loss was caused by the union's breach of duty. The Court emphasized that if the trial court did find both the union and the employer at fault, it would make little sense to fashion a remedy only with respect to the employer, for that would hardly be a deterrent to future union misconduct. 386 U.S. at 187, 17 L.Ed. 2d at 856. Indeed, it was precisely the compelling need for a complete remedy in § 301 suits involving a union's breach of its duty of fair representation that provided significant underpinning for the Court's holding in *Vaca* that an action against the union for such a breach could be judicially maintained even though the union's misconduct might also constitute an unfair labor practice and, hence, arguably be preempted by the NLRA. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775 (1959).

But what sort of remedy would the Court have had in mind as appropriate to afford full relief in situations such as that presented in *Vaca*? Clearly, the usual remedy in wrongful discharge cases is reinstatement with backpay. *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263, 24 L.Ed. 2d 405, 410-411 (1969). Because it is the employer, not the union, that ultimately controls the employment relationship, reinstatement can be obtained only from the employer. However, there is no similar impediment to requiring a union to make the employee whole, at least in some measure, for lost earnings. Yet, if backpay as well as reinstatement is deemed the sole responsibility of the employer, the Court's discussion of the need to afford an employee a judicial remedy against a union which has breached its duty of fair representation is largely academic: there would be little, if any, effective deterrent against such

union misconduct if the union could not be held liable for backpay, and, hence, the rationale advanced by the Court for rejecting the NLRA preemption argument urged by the petitioners in *Vaca* would be substantially undermined.

To be sure, a union might still be held liable for the attorney's fees and court costs that an employee incurred in undertaking litigation that he would not otherwise have had to undertake had the union not breached its duty. However, there is no suggestion in the Court's opinion that it was thinking only of an award of legal fees and court costs against the union, instead of the normal backpay remedy, when it spoke of the need to provide an effective deterrent to union misconduct and to afford full relief to employees.

Even more to the point, Part IV of the Court's opinion in *Vaca*, 386 U.S. at 195-198, 17 L.Ed. 2d at 860-862, specifically addresses the issue of damages in a way which seems to clearly contemplate that the damages it was referring to were primarily the employee's loss of earnings, and that the union might be held liable for a portion of that loss. Thus, the Court concluded (386 U.S. at 197-198, 17 L.Ed. 2d at 862):

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.

Surely this statement of "the governing principle" is couched in terms broad enough to provide flexibility and specifically suggests that backpay liability is the responsibility of both the employer and the union. Certainly it reflects an awareness that backpay is a liability which is normally incurred in wrongful discharge cases; the

amount of that liability may well be increased by the union's "fault" in handling the employee's grievance because the employee was not offered reinstatement as soon as he would have been had the union represented him fairly; and that backpay is a liability which is easily subject to apportionment.[6]

The opinions in two cases decided by this Court since *Vaca v. Sipes* provide additional support for imposing appropriate backpay liability on a union in a § 301 action in which the union's breach of duty caused a greater loss of earnings to the employee than would have accrued had

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[6] With respect to the particular facts in *Vaca*, the Court remarked that "even if the Union had breached its duty, all or almost all of [the employee's] . . . damages would still be attributable to his allegedly wrongful discharge by . . . [the employer]." 386 U.S. at 198, 17 L.Ed. 2d 862. If the Court meant that this is because the employer is exclusively liable for lost earnings, then what liability is there to be apportioned in § 301 wrongul discharge cases? Conceivably, all backpay liability could be "apportioned" to the employer and litigation costs could be "apportioned" to the union. But then why would "all or almost all" of the employee's damages in *Vaca* have been attributable to the employer? The litigation costs could not have been insignificant in that case, and, under the traditional American rule, would not have been recoverable against the employer but should have been recoverable against the union as costs the employee would not have incurred but for the union's breach of its duty to represent him fairly. *Scott v. Local Union 377, IBTCWHA*, 548 F.2d 1244, 1246 (6th Cir. 1977), and cases cited therein. Most plausibly, the Court in *Vaca* did not intend to generally rule out apportionment of backpay liability between the employer and the union, but simply concluded on the basis of the *Vaca* record that the employee would not have received a favorable decision from an arbitrator appreciably sooner than he did from the trial court, especially where his grievance was only "finally dismissed by the Union and . . . [the employer] shortly before the trial began in June 1964. . ." 386 U.S. at 176, 17 L.Ed 2d at 849. Of course, the Court's allocation of "fault" in *Vaca* was necessarily speculative and hypothetical in any event because it had already determined "that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation." 386 U.S. at 193, 17 L.Ed. 2d at 859.

the union properly handled the employee's grievance. In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 47 L. Ed. 2d 231 (1976), the Court extended the principles of *Vaca v. Sipes* to § 301 wrongful discharge cases in which the union processes the employee's grievance to arbitration but then fails to represent the employee fairly in the arbitration proceeding itself. It was held that in such circumstances the employees, "if they prove an erroneous discharge and the Union's breach of duty tainting the [arbitration] decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union." 424 U.S. at 572, 47 L.Ed. 2d at 246. In a concurring opinion, Justice Stewart spelled out the division of remedial responsibility between the employer and the union as follows (424 U.S. at 573, 47 L.Ed. 2d at 246-247):

> If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. Liability for the intervening wage loss must fall not on the employer but on the Union.

Significantly, Justice Stewart deemed the foregoing apportionment of damages to be "mandated" by the earlier *Vaca* decision. A similar apportionment is equally mandated by *Vaca* in situations in which the union decides not to take the employee's grievance to arbitration in the first place. The employer is similarly entitled to place good faith reliance on the union's determination in this respect in refusing to reinstate discharged employees. As the majority opinion in *Hines* pointed out, "it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation." 424 U.S. at 572, 47 L.Ed. 2d at 246, quoting from *Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974). In neither case also, we submit,

should the union escape its fair share of backpay liability.

In *Clayton v. Automobile Workers*, —— U.S. ——, 68 L.Ed. 2d 538 (1981), the Court held that an employee who alleges he was wrongfully discharged and that his union breached its duty of fair representation by refusing to submit his grievance to arbitration is entitled to maintain a § 301 action against both his employer and his union even though he had failed to exhaust internal union appeals procedures. The Court's opinion mentions the fact that at least some monetary relief in the form of backpay was available to the employee through the internal union appeals procedure. Significantly, though, the opinion does not so much as hint at the proposition that this relief would be purely gratuitous because, as the Fourth Circuit would have it here, reimbursement of lost earnings is "the obligation of the [employer] . . . exclusively." Instead, the Court noted that, whereas reinstatement is available only from the employer, "[d]amages, however, can be assessed against both the employer and the union" apportioned according to the damage caused by the fault of each (citing *Vaca v. Sipes*, *supra*). —— U.S. ——, ——, n. 15, 68 L.Ed. 2d 538, 549, n. 15. When read in conjunction with the text, the implication is that the "damages" referred to in the note include backpay, and that *Vaca* authorizes a backpay award against a union as well as an employer in a § 301 wrongful discharge case.

Czosek v. O'Mara, 397 U.S. 25, 25 L.Ed. 2d 21 (1970), decided after *Vaca* but before *Hines*, does not reject the principle of imposing backpay liability on unions in wrongful discharge cases even though *in that case* the Court concluded that "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 397 U.S. at 29, 25 L.Ed. 2d at 25. As the opinion of the lower court pointed out, the employees in *O'Mara* had a statutory right under the Railway Labor Act, 45 U.S.C.

§ 151 *et seq.*, to prosecute their own grievances before the National Railroad Adjustment Board, but they failed to exhaust their remedies in this regard. *O'Mara v. Erie Lackawanna Railroad Company*, 407 F.2d 674, 677 (2d Cir. 1969). Although the union could be faulted for causing the employees additional expense and difficulty by not processing their grievances and thereby breaching its duty of fair representation, the union's fault did not deprive the employees of their opportunity to collect lost earnings from their employer if they could establish that they had been improperly discharged. In short, *O'Mara* stands for no more than the proposition that a union should not have to pay for lost earnings which the employees themselves could have obtained from their employer by processing their own grievances, as they were entitled to do. *Harrison v. United Transportation Union*, 530 F.2d 558, 562 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

B. The Apportionment Principles Applied By The Court Of Appeals Are Neither Consistent With National Labor Policy Nor Equitable In Placing Exclusive Liability For Backpay On The Employer

Where, as here, the District Court has found that a wrongfully discharged employee would have been offered reinstatement far sooner than he was had the union not breached its duty of fair representation, there is no justification in national labor policy or in equity for holding the employer responsible for all of the employee's lost earnings and the union responsible for none. Plainly, the union's breach of duty has caused the employee to lose earnings above and beyond what he would have lost as a result of the employer's contract violation.

The national labor policy is generally in harmony with ordinary concepts of equity in holding unions financially accountable for their actions. For example, § 301 of the LMRA not only authorizes employees and unions to sue employers for contract violations, but also authorizes

employers to sue unions for such violations. Breach of a no-strike clause by a union can result in an award of heavy damages. *See, e.g., Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 8 L.Ed. 2d 462 (1962). Furthermore, § 303 of the LMRA (29 U.S.C. § 187) permits the recovery of damages against a union by "[w]hoever shall be injured in his business or property" because of the union's violation of the secondary boycott provisions of § 8(b)(4) of the National Labor Relations Act (29 U.S.C. § 158 (b)(4)). *See, e.g., Vulcan Materials Co. v. U.S. Steelworkers*, 430 F.2d 446 (5th Cir. 1979), *cert. denied*, 401 U.S. 963, 28 L.Ed. 2d 247 (1971). Indeed, this Court has held that the national labor policy, as embodied in the NLRA, does not shelter unions from liability under the federal antitrust law "when a union and a nonlabor party agree to restrain competition in a business market." *Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622-623, 44 L.Ed. 2d 418, 426 (1975).

With respect to backpay awards against a union which violates § 8(b)(2) of the NLRA (29 U.S.C. § 158 (b)(2)) by causing an employer to engage in discrimination against employees to encourage or discourage union membership, the National Labor Relations Board has placed the entire backpay liability on the union when it was necessary to do so in order to make whole employees who were discriminated against. In *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 54-55, 98 L.Ed. 455, 484-485 (1954), this Court emphatically rejected the argument that it would not effectuate NLRA policies to require the union "to reimburse back pay if the employer is not made to share this burden."

It is even more significant that in the very type of case now before this Court—that is, in which a union has breached its duty of fair representation in processing the grievance of an employee discharged in violation of a collective bargaining agreement—the NLRB does not hesitate to render a backpay award against the union.

Thus, the Board has long held that a union which breaches its duty of fair representation violates § 8(b)(1)(A) of the NLRA (29 U.S.C. § 158 (b)(1)(A)). *Massachusetts Laborer's District Council*, 230 NLRB 640, 642-643 (1977); *Miranda Fuel Company, Inc.*, 140 NLRB 181, 184-185 (1962). Moreover, when it finds that a union has breached its duty in processing an employee's grievance, it presumes (at least in the absence of clear evidence to the contrary) that the grievance would have been found to be meritorious and requires the union to compensate the aggrieved employee for any loss of earnings. *E.g., Henry J. Kaiser Co. and Journeymen Pipe Fitters Local No. 392*, 259 NLRB No. 1 (1981); *Teamsters Local 559*, 257 NLRB No. 6 (1981); *Laborers Int'l Union, Local 324*, 234 NLRB 367 (1978); *United Steelworkers of America (InterRoyal Corp.)*, 223 NLRB 1184 (1976). Had Petitioner in the instant case filed an unfair labor practice charge against the Union with the Board, instead of filing an action against both his employer and the Union in court, there is no question that, upon finding the same breach of the duty of fair representation by the Union as the court found, the Board would have required the Union to make Petitioner whole for the loss of earnings *from the date of his discharge. Henry J. Kaiser Co. and Journeymen Pipe Fitters Local No. 392, supra.* If the Board would find sufficient causation between a union's breach of its duty and an employee's loss of earnings to warrant imposing full backpay liability on the union, plainly a district court should be entitled to find that the same causative relationship warrants a partial backpay award against the union based on the principle of apportionment articulated by this Court in *Vaca v. Sipes.*

Commentators have generally endorsed the apportionment approach taken by the District Court in the instant case. See Henkle, *Apportionment of Damages in Duty of Fair Representation/Contracts Suits: Who Pays For the Union's Breach?* 1981 Wis. L. Rev. 155; Linsey, *The Ap-*

portionment of Liability for Damages Between Employer and Union in § 301 Actions Involving A Union's Breach of its Duty of Fair Representation, 30 Mercer L. Rev. 661 (1979); Martucci, *Employer Liability for Union Unfair Representation: The Judicial Predilection and Underlying Policy Considerations*, 46 Missouri L. Rev. 78 (1981). *See also*, Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 818-824 (1973). As one summed up the matter (Linsey, *supra*, 30 Mercer L. Rev. at 679):

> . . . . the apportionment of liability for damages in § 301 actions against the employer and union involving the union's breach of its duty of fair representation must be analyzed as a question of causation. Proper analysis of the question of causation requires the conclusion that damages which would not have been sustained but for the union's breach of its statutory duty are not attributable to the employer; such damages are attributable only to the union. To charge the employer for these damages is contrary to law and policy.

Linsey thus urges broad application of the analysis utilized by Justice Stewart in his concurring opinion in *Hines v. Anchor Motor Freight*, *supra* (*i.e.*, that damages sustained by the employee after a tainted arbitral decision are not attributable to the employer), Linsey, *supra*, 30 Mercer L. Rev. at 678.

The approaches to apportionment taken by the courts of appeals and the district courts in applying *Vaca v. Sipes* have varied. The First Circuit, though declining to award backpay against a union on the facts before it, implied that it would do so upon persuasive evidence that "but for the union's conduct, the employee would have been reinstated or reimbursed at an earlier date." *DeArroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 289-90 (1st Cir. 1970). And the District Court in *Ruzicka v. General Motors*, 96 LRRM 2822

(E.D. Mich. 1977), *vacated on other grounds and remanded*, 649 F.2d 1207 (6th Cir. 1981), *dismissed*, 519 F. Supp. 893 (E.D. Mich. 1981), rejected the proposition that an employer was exclusively liable for backpay and apportioned half of that liability to the union.[7] *See also Wyatt v. Interstate & Ocean Transport Co.*, 439 F. Supp. 1310, 1314 (E.D. Va. 1977); *Atwood v. Pacific Maritime Ass'n*, 432 F. Supp. 491, 495-496 (D. Ore. 1977).

Where, for whatever reason, a backpay award cannot be rendered against the employer and the choice is thus between imposing full backpay liability on the union or failing to adequately compensate the injured employee, courts have been quite willing to hold the union responsible for full backpay. *Foust v. I.B.E.W.*, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979); *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 492 (4th Cir. 1966), *cert. denied*, 386 U.S. 960 (1967). It is only where both the employer and the union are before the court that some courts have suggested that the employer must bear all of the backpay liability and the union none. *See, e.g., Harrison v. Chrysler*, 558 F.2d 1273, 1279 (7th Cir. 1977); *Scott v. Anchor Motor Freight*, 496 F.2d 276, 281-282 (6th Cir. 1974), *cert. denied*, 419 U.S. 868 (1974); *Richardson v. Communications Workers of America*, 443 F.2d 974, 981-982 (8th Cir. 1971).

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[7] The court in *Ruzicka* thus accepted the principle of union liability for backpay in cases like the instant case even though the basis on which it made the apportionment appears to be in the nature of an *ad hoc* subjective determination, as opposed to the more logical and precise "but for" standard used by the District Court in this case. Accordingly, *Ruzicka* does not utilize a workable apportionment rule of general applicability, whereas the decision of the District Court in this case does.

From the standpoint of employers, the latter is neither equitable nor consistent with the reality with which their day-to-day labor relations must be conducted. Collective bargaining agreements are not stone tablets setting forth absolute moral commandments. Rather, they are pragmatic efforts to establish a framework within which the employer, the employees, and their union representatives can operate. As such, they cannot and do not attempt to make provision for every contingency. There is a common recognition that, even with the best of intentions and complete good faith, disputes between the parties as to the meaning of their agreements will inevitably arise. Hence, grievance/arbitration procedures for resolving such disputes are standard in most contracts.

There is usually a special awareness among the parties that employee discharges and other disciplinary actions are particularly sensitive matters about which reasonable men can and frequently do differ. Questions relating to the appraisal of an employee's performance, the gravity of an offense, the need of the business to operate efficiently, and the severity of a penalty meted out often require the finest judgment for fair resolution. Employers know when they enter into a collective bargaining agreement in which they have made a commitment to impose disciplinary action against employees only for good cause that their determinations in this regard will not always survive the scrutiny of the grievance procedures or review by an arbitrator. But they also have a right to expect that that is where the matter will end, at least insofar as their liability for backpay is concerned.

In short, in a world in which grievances over discharges and other disciplinary actions are an ordinary and accepted part of the collective bargaining process and are to be resolved in accordance with the procedures agreed upon by labor and management, the employer is entitled to the certainty that his backpay liability will

not be open-ended. A "wrongful" discharge should be treated as triggering only the sort of backpay liability which, in effect, the employer bargained for: that is, liability limited to what it would have been had the grievance/arbitration machinery functioned properly. Nor should the employer be required to make certain the union represents its employees fairly. *Harrison v. United Transportation Union*, *supra*, 530 F.2d at 561. Rather, it should suffice that the employer remains responsible for his role in the grievance/arbitration process without having to assume the financial consequences of the union's failure to responsibly fulfill its role. In sum, to impose all backpay on the employer and none on the union because the employer initiated a discharge ultimately found to violate the collective bargaining agreement is to distort the actual nature of the employer's contract commitment and to ignore the way in which grievance/arbitration procedures function in fact.

IV. CONCLUSION

For all of the foregoing reasons, Amicus Chamber of Commerce submits that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: February 1, 1982

Docket Sheet

NO. 81-525-CFX	TITLE	Charles V. BOWEN, Petitioner v. United States Postal Service, et al.

DOCKETED	COURT
Sept. 15, 1981	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: William B. Poff
	Counsel for Respondents: Solicitor General Asher W. Schwartz, Darryl J. Anderson,
Sept. 15, 1981	Petition for writ of certiorari filed. (Record filed).
Oct. 14, 1981	Order extending time for the Government to file a response to the petition until Nov. 5, 1981.
Oct. 16, 1981	Motion for respondent, American Postal Workers Union, AFL-CIO in opposition filed.
Oct. 20, 1981	Memorandum for the Federal Respondent in opposition filed.
Oct. 23, 1981	Supplemental brief for respondent, American Postal Workers Union, AFL-CIO in opposition filed.
Oct. 28, 1981	DISTRIBUTED. 11-13.
Nov. 4, 1981	Reply brief for the petitioner filed. (D).
Dec. 1, 1981	REDISTRIBUTED. 12-4.
Dec. 7, 1981	Petition GRANTED.

Jan. 19, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Feb. 1, 1982.
Feb. 1, 1982	Joint appendix filed.
Feb. 1, 1982	Brief for the petitioner filed.
Feb. 1, 1982	Brief for the Chamber of Commerce of the U. S. filed. (AMICUS)
Feb. 9, 1982	Brief for the Federal Respondent filed.
Feb. 17, 1982	Motion of the Solicitor General for divided argument and for additional time for oral argument filed.
Feb. 24, 1982	Order extending time for respondent American Postal Workers Union, to file the brief on the merits until March 22, 1982.
Mar. 1, 1982	The motion of the Solicitor General for divided argument is GRANTED. The request for additional time for oral argument is DENIED.
Mar. 23, 1982	Brief for the respondent union filed.
Mar. 23, 1982	Order extending time to file respondent union's brief on the merits until March 23, 1982. (Orally, ALS).
July 13, 1982	CIRCULATED.
Sept. 24, 1982	Reply brief for the Federal Respondent filed. (D).
Sept. 28, 1982	Reply brief for the petitioner filed. (D).
Oct. 6, 1982	ARGUED.